INDIAN CLAIMS COMMISSION PROCEEDINGS

(2000) 13 ICCP

Reports

The Key First Nation Inquiry
1909 Surrender

Walpole Island First Nation Inquiry
Boblo Island

Carry the Kettle First Nation Inquiry
Cypress Hills

Responses

Response of the Minister of Indian Affairs and Northern Development
to the
Long Plain First Nation Inquiry
Loss of Use

101-04229/

INDIAN CLAIMS COMMISSION PROCEEDINGS

A PUBLICATION OF

THE INDIAN CLAIMS COMMISSION

(2000) 13 ICCP

CO-CHAIRS

Daniel J. Bellegarde
P.E. James Prentice, QC

COMMISSIONERS

Roger J. Augustine
Carole T. Corcoran
Sheila G. Purdy

© Minister of Public Works and Government Services Canada 2000
Available in Canada through
your local bookseller
or by mail from
Canada Communication Group — Publishing
Ottawa, Canada K1A 0S9
Catalogue No. RC12-1/2000-13E
ISSN 1195-3586
ISBN 0-662-29542-0

The Indian Claims Commission Proceedings is a continuing series of official reports, background documents, articles, and comment published by the Indian Claims Commission (Canada).

For information about subscriptions and extra copies or to request the French edition, *Actes de la Commission des Revendications des Indiens*, please contact

Indian Claims Commission
427 Laurier Avenue West, Suite 400
Ottawa, Canada K1P 1A2
(613) 943-2737
Fax (613) 943-0157

Web site: www.indianclaims.ca

CONTENTS

Letter from the Co-Chairs
v

Abbreviations
vii

REPORTS

The Key First Nation Inquiry
1909 Surrender
3

Walpole Island First Nation Inquiry
Boblo Island
117

Carry the Kettle First Nation Inquiry
Cypress Hills
209

RESPONSES

Re: Long Plain First Nation Loss of Use Inquiry
Robert D. Nault, Minister of Indian Affairs and
Northern Development, to Daniel J. Bellegarde, James Prentice,
and Carole T. Corcoran, Indian Claims Commission,
August 21, 2000
327

THE COMMISSIONERS
331

FROM THE CO-CHAIRS

This is the 13th volume of the *Indian Claims Commission Proceedings*. We are pleased to present it on behalf of the Commissioners of the Indian Claims Commission. The volume includes three reports of the Commission and a letter from the Minister of Indian Affairs and Northern Development responding to the Commission's recommendations in the Long Plain First Nation inquiry.

The first report is the Commission's inquiry into The Key Band claim regarding the surrender of approximately 11,500 acres of land in eastern Saskatchewan in 1909. At issue was the legality of the surrender of half the Band's reserve. The Band argued that, under Treaty 4, a higher level of consent was necessary and that another group, the Shoal River Indians, were actually members of The Key Band and had not been consulted on the surrender. After careful review, the Commission found that the surrender had been lawful. It found that there is no higher level of consent required under Treaty 4 and that the Shoal River Indians were not members of The Key Band. The Commission therefore recommended against negotiation of a settlement.

The second report concerns the Commission's inquiry into the alleged surrender of Boblo Island in the Detroit River in southern Ontario by the Walpole Island First Nation. The Commission found that an agreement in 1786 between Deputy Indian Agent Alexander McKee and some Ottawa and Chippewa Chiefs did not properly comply with the surrender requirements as laid out in the *Royal Proclamation of 1763*. It further found that a 1790 treaty with the colonial government which was intended to clarify land title in the area did not include Boblo Island in its description of the land surrendered. The Commission concluded that the island may still remain under aboriginal title and recommended that the First Nation submit a claim under the federal Comprehensive Claims Policy to resolve the status of the land.

The third report is the Commission's inquiry into the Carry the Kettle First Nation's claim to a reserve in the Cypress Hills in southern Saskatchewan. The First Nation asserted that, under Treaty 4, it had a reserve in the western section of the Hills that should be recognized by the federal government. The Hills were the First Nation's traditional territory and, in 1879, after adhering to Treaty 4, the First Nation selected a reserve site. In 1880, however, the federal government relocated several First Nations living in the Hills to Maple Creek because it was concerned that there might be more unrest along the border with the United States after the Cypress Hills Massacre of June 1873.

The Commission found that, under Canadian law, the First Nation does not have a reserve in the Cypress Hills. The Commission found that a reserve is not a reserve unless both the First Nation and the government recognize it as such and, the government having decided to relocate the Assiniboine, clearly did not accept the Band's reserve selection. While the circumstances of this case do not, strictly speaking, give rise to an outstanding lawful obligation, the Commission relies upon its supplemental mandate to recommend the government recognize, rather than deny, the Assiniboine historical occupation and spiritual connection to their traditional territory.

Finally, also contained in this volume of the *Proceedings* is a copy of a letter from the Minister of Indian Affairs and Northern Development regarding the Long Plain First Nation's claim to compensation for the loss of use of treaty entitlement land that was promised but not delivered. In the letter, the Minister writes that the Government of Canada is unable to respond to the Commission's recommendation to negotiate a settlement for the loss of use of the land because the Commission's report does not take into consideration the *Venne* decision of the Court Queen's Bench of Saskatchewan concerning the calculation of treaty land entitlement claims. This decision was released after the completion of the inquiry.

Daniel J. Bellegarde
Co-Chair

P.E. James Prentice, QC
Co-Chair

ABBREVIATIONS

AC	Appeal Cases
BCR	Band Council Resolution
CA	Court of Appeal
CCC	Canadian Criminal Cases
CNLR	Canadian Native Law Reporter
CPR	Canadian Patent Reporter
DIAND	Department of Indian Affairs and Northern Development
DLR	Dominion Law Reports
DLS	Dominion Land Surveyor
DOFS	date of first survey
DSGIA	Deputy Superintendent General of Indian Affairs
FC	Canada Federal Court Reports
FCA	Federal Court Appeal Division
FCTD	Federal Court Trial Division
HL	House of Lords
ICC	Indian Claims Commission
ICCP	Indian Claims Commission Proceedings
IR	Indian Reserve
NA	National Archives of Canada
NWMP	North-West Mounted Police
OJ	Ontario Judgments
OR	Ontario Reports
PC	Privy Council
QB	Court of Queen's Bench
RSC	Revised Statutes of Canada
SC	Statutes of Canada

SC	Supreme Court (provincial)
SCC	Supreme Court of Canada
SCJ	Canada Supreme Court Judgments
SCR	Canada Supreme Court Reports
SCW	Specific Claims West
SGIA	Superintendent General of Indian Affairs
TD	Trial Division
TLE	treaty land entitlement
UFA	United Farmers of Alberta
YCA	Yukon Court of Appeal
YSC	Yukon Superior Court

REPORTS

The Key First Nation Inquiry
1909 Surrender
3

Walpole Island First Nation Inquiry
Boblo Island
117

Carry the Kettle First Nation Inquiry
Cypress Hills
209

INDIAN CLAIMS COMMISSION

THE KEY FIRST NATION INQUIRY
1909 SURRENDER CLAIM

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Carole T. Corcoran
Commissioner Roger J. Augustine

COUNSEL

For The Key First Nation
James Jodouin

For the Government of Canada
Richard Wex

To the Indian Claims Commission
David E. Osborn, QC / Ralph Keesickquayash

MARCH 2000

CONTENTS

EXECUTIVE SUMMARY 7

PART I ***INTRODUCTION*** 16
Background to the Inquiry 16
Mandate of the Commission 17

PART II ***HISTORICAL BACKGROUND*** 19
Prior to Treaty 19
  The Followers of Chief Ow-tah-pee-ka-kaw – "The Key" 20
  Claim Area Map 21
  Adherence to Treaty 4 22
The Key Band Adhesion to Treaty 4 26
  The Key Band Reserve Surveyed at Swan River in 1878 27
  The Reserve at Swan River 28
  The Creation of The Key Band Indian Reserve 65 30
The Shoal River Faction after 1881 32
  Reserves 65A to 65E in and around Shoal Lake and Dawson Bay 34
  Separate Annuity Paylist for Shoal River "Band" in 1902 36
Life on The Key Band Indian Reserve 65 before 1909 37
  Proposed Surrender for Exchange, 1903–06 47
The 1909 Surrender 52
  Map of The Key IR 65 Lands Surrendered 58
Post-surrender Events 61

PART III ***ISSUES*** 64

PART IV ***ANALYSIS*** 65
Issue 1: Validity of the 1909 Surrender 65
  Applicability of Treaty 4 65
Issue 2: Was the *Indian Act*, RSC 1906, c. 81, Complied with? 71
  Surrender Provisions of the 1906 *Indian Act* 71
  Surrender Meeting 74
  Majority Assent 80
  Compliance with section 49(1) of the *Indian Act* 83

Issue 3: Were the Shoal River Indians Members of The Key Band in 1909? 87
  Membership and Eligibility to Vote 87
  Autonomy 88
  Habitual Residence 92
Issue 4: Did Canada Breach Its Fiduciary Obligations to The Key Band? 94
  Nature of the Pre-surrender Fiduciary Duty 94
  Inadequate Understanding 97
  Tainted Dealings 101
  Cession or Abnegation of Decision-Making Power 106
  Exploitative Bargain 108

PART V ***CONCLUSIONS AND RECOMMENDATION*** 113

APPENDIX 115
A The Key First Nation 1909 Surrender Inquiry 115

EXECUTIVE SUMMARY

HISTORICAL BACKGROUND

Since the middle of the 19th century, Chief The Key and his followers had resided in the vicinity of the Shoal River in southwestern Manitoba, where they hunted, fished, and pursued employment with the Hudson's Bay Company. Their homeland was part of the territory ceded to the Crown by the terms of Treaty 4 in 1874, although The Key Band did not adhere to treaty until September 1875. They had some ground under cultivation by the time of their adherence to treaty, but they did not receive a reserve until 1878, when some 31,000 acres of land were surveyed for them at Swan River. In 1880, officials of the Department of Indian Affairs decided that the likelihood of annual flooding made the location of the reserve unsuitable and encouraged the Band to relocate to the Fort Pelly district, about 90 miles to the southwest.

Chief The Key, together with 12 families, was agreeable to the move, and this group relocated permanently to Fort Pelly in 1882. The majority of the Band, however, refused to leave their traditional homeland. Under the leadership of Headman John Beardie, the group resident at Shoal River petitioned the Department of Indian Affairs in 1882, 1884, and 1885 for their own reserve at that location, stating that they had no interest in relocating to a new reserve at Pelly and repudiating the leadership of Chief The Key. The department did not consider it advisable to grant their request, however, and proceeded on the assumption that the entire Band would eventually settle at Pelly. As a result, a reserve sufficient in size for 190 people was surveyed in 1883 for The Key Band at Pelly, even though only 83 band members resided at that location. The new reserve, Indian Reserve (IR) 65, was formally confirmed by Order in Council in May 1889 and withdrawn from the operation of the *Dominion Lands Act* in June 1893.

In 1889, the Department of Indian Affairs finally acceded to the repeated requests of the Shoal River Indians and began to survey a number of small reserves for their use in the vicinity of Shoal River. Several of the orders in council confirming these reserves appeared to indicate that they had been set aside for the entire Key Band, but at least one of them referred merely to "the Indians of Treaty No. 4." Until 1902, the Shoal River Indians were listed on one paylist with the followers of Chief The Key and required to travel to Pelly for their annuity payments. From 1902 onward, however, the Shoal River Indians were placed on a separate paylist entitled "Shoal River Band Paid at Shoal River Reserve," and administrative responsibility for them was transferred to a separate agency.

In the meantime, the followers of Chief The Key had established themselves at Pelly and had begun to cultivate grain and garden crops, although their progress was slow. They appeared to be more successful at stock raising, and, in support of this activity, the department set aside 20 square miles of haylands in 1893 for communal use by the three Pelly Agency Bands, including The Key Band. By 1899, however, approximately one-half of the haylands were required by the Department of the Interior for other purposes, leaving only 6,000 acres for the use of the three bands.

As a result, in 1902–03, the Department of Indian Affairs put forward a plan to exchange less valuable lands within the three reserves for the remaining haylands. Officials of the department instructed Agent H.A. Carruthers to approach The Key Band to discuss the surrender and exchange proposal, and a meeting was held at IR 65 on December 14, 1903. At that time, a majority of the Band indicated their assent to the surrender of a strip of land on the west side of the reserve in exchange for a portion of the haylands, as well as the surrender and sale of a strip of land on the east side of the reserve to fund the acquisition of machinery and horses for the Band. Chief The Key voted against the proposal, in the agent's opinion, because it was "the thin edge of the wedge, and ... his whole Reserve would ultimately be taken from him." According to the agent, Chief The Key acknowledged, however, that the plan was in the best interests of the Band. In any event, the 1903 surrender proposal never materialized, and the department did not discuss the subject of surrenders with The Key Band again until 1908.

In the early years of the 20th century, the dominion government initiated a policy of encouraging non-aboriginal agricultural settlement on the prairies. In support of this policy, the Department of Indian Affairs promoted surrenders and sales of reserve land in those areas where it considered that the Indians were holding tracts of farming land beyond their possible requirements. To facilitate the policy, the *Indian Act* was amended in 1906 to permit the department to advance up to 50 per cent of the anticipated sale proceeds to a band immediately on surrender. The advance could be used to provide agricultural provisions, support for the elderly, and other such items, thereby giving departmental officials considerable flexibility in negotiating surrenders.

In the spring of 1908, Dr E.L. Cash, the local Member of Parliament and one-time departmental medical officer for the Pelly Agency, wrote to the department about a possible surrender of The Key reserve. In response, Deputy Superintendent General Frank Pedley advised him that the department was not aware of any desire by the Band to surrender its reserve. In July 1908, Agent W.G. Blewett at Pelly told Inspector W.M. Graham that members of The Key Band wished to sell 13 sections of their reserve land because they had "too much land and not enough horses and implements." The land to be surrendered was identified as a one-mile-wide strip on the west side of the reserve, and a one-and-one-half-mile-wide strip on the east side of the reserve. It was also stipulated that each band member would receive an immediate payment of $80 at the time of surrender. Blewett supported the proposal, as did Graham, although the latter noted that he required a decision concerning the right of the Shoal River Indians to vote on the surrender.

In January 1909, Graham reported that he had held a meeting with members of The Key Band to discuss the surrender and had persuaded them to surrender 17 sections of reserve land instead of the 13 sections originally contemplated. He also noted that the Band had requested that the immediate payment be increased to $100, an amount he considered reasonable.

No immediate action was taken to obtain the surrender, and in April 1909 Agent Blewett wrote to his superiors conveying the concern expressed by members of The Key Band over the delay. Graham finally arrived at The Key reserve to take the surrender on May 18, 1909, and subsequently reported to the Deputy Superintendent General that "nearly all the members of the Band were present and the vote was unanimous." The surrender document bears the purported marks of five band members and the signatures of two other band members, although no record exists of how many attended or voted in favour. A surrender paylist bearing the same date as the surrender indicates that 87 band members were paid the contemplated $100 advance. An affidavit of Inspector Graham and of Chief The Key, dated May 19, 1909, attests that the surrender meeting was held and that the surrender was assented to by a majority of the male members of the Band of the full age of 21 years and present at the meeting. This document bears Graham's signature and the purported mark of Chief The Key.

All the documentation was forwarded to the Privy Council, and the surrender of 11,500 acres was accepted by Order in Council in June 1909. The surrendered land was offered for sale by public auction on December 1, 1910, although not all of it was sold at that time. In November 1910, a second parcel of land was surrendered for sale to the Anglican Church, and the following year the unsold land from the first surrender was again offered for sale by auction. Shortly afterwards, members of the Band made inquiries about the interest payments that were due them under the terms of the 1909 surrender, and funds from this source were distributed to the Band in 1913 and 1914. There is no evidence that any band member ever made a contemporary complaint about the 1909 surrender.

ISSUES

The broad question before the Indian Claims Commission in this inquiry is whether the claim of The Key First Nation discloses a breach of Canada's "lawful obligations" to the First Nation under the Specific Claims Policy. Canada and the First Nation have agreed that an assessment of the validity of the claim requires consideration of the four issues that follow:

Issue 1: Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

Issue 2: Was the *Indian Act*, RSC 1906, c. 81, complied with?

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

Issue 3: Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?

Issue 4: Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

LEGAL ANALYSIS AND FINDINGS

ISSUE 1: TREATY 4 "CONSENT"

The First Nation submits that the terms of Treaty 4 establish a higher threshold of "consent" required for reserve land surrenders than the provisions of the *Indian Act* and, in particular, that the treaty-mandated "consent" should be interpreted by reference to the First Nation's tradition of clan governance. In accordance with the decision of the Supreme Court of Canada in *R. v. Marshall*, the First Nation relies on extrinsic evidence, in this case oral history evidence, in support of its submission that the Band's traditional decision-making process was intended to have the force of a treaty right. Canada relies on a previous determination of the Commission to the effect that no conflict exists between the terms of the treaty and the surrender provisions of the Act, as the former did not establish a required level of consent or a means of expressing consent to surrenders. Further, Canada submits that there is no compelling extrinsic evidence to support the First Nation's submission that the treaty should be interpreted in the way it alleges. The Commission, in considering the submissions and the decision of the Supreme Court in *Marshall*, notes that the legal test appears to require that the common intention of the parties at the time the treaty was made be ascertained. In this inquiry, the Commission finds that there is no evidence that, ***at the time Treaty 4 was made***, the parties intended to establish within its terms a standard or threshold of consent for the surrender of land. As a result, there is no evidence of a conflict between the terms of the treaty and the provisions of the *Act*.

ISSUE 2: COMPLIANCE WITH *INDIAN ACT* PROCEDURES

The surrender provisions of section 49(1) of the *Indian Act* contemplate five mandatory components: that a meeting be summoned for the express purpose of considering the surrender; that the meeting be held in accordance with the rules of the band; that it be held in the presence of an authorized officer; that a majority of the male members of the band 21 years of age and older attend the meeting; and that a majority of those members vote in favour of the surrender. The parties have focused their submissions on the first and fourth of the above criteria.

The First Nation submits that there is insufficient evidence to establish that there was compliance with the mandatory requirements of the *Act*, based on the general lack of detailed documentary evidence concerning events on the day of the surrender, the lack of oral history concerning the event, and the testimony of a handwriting expert to the effect that the "X" marks on the documents were not authentic. Canada submits that the existing documents should be accepted at face value in support of the conclusion that the requirements were met, as the pre-surrender and post-surrender conduct of the Band is consistent with such a conclusion. Canada questions the evidentiary value of the oral history in this inquiry and takes the position that the testimony of the handwriting expert is irrelevant.

The Commission notes that the Specific Claims Policy places the burden on the claimant to establish that Canada breached its lawful obligations in obtaining the surrender. In this context, the Commission holds that the ***absence*** of oral history evidence is not determinative of the issue of compliance with the *Act*, and that all the evidence must be considered to arrive at a conclusion.

With respect to the handwriting expert's testimony, the Commission holds that, even if his evidence were to be accepted in its entirety, it would not determine the fundamental questions about the meeting and the proper majority consent, since it is possible that band members authorized another individual to make the "X" marks on their behalf. As a result, this evidence is not relevant to the determination.

Owing to the scarcity of documentary evidence about events surrounding the surrender itself, the Commission has examined evidence that preceded and followed the surrender, an approach it believes is consistent with the intention-based approach mandated by the Supreme Court in the *Apsassin* case. Based on this evidence, which is consistent with a theory that proper procedures were followed, the Commission concludes that the First Nation has not discharged the burden upon it to establish that Canada did not comply with the surrender provisions of the *Indian Act*.

ISSUE 3: SHOAL RIVER INDIANS

The provisions of the *Indian Act* require that a surrender be assented to by a majority of eligible voting members of the Band who habitually reside on or near, and are interested in, the reserve in question.

The First Nation has taken the position that the surrender is invalid because the Shoal River Indians did not vote on it, and that the addition of their numbers to the eligible voting population would mean that the *Act*'s majority voting requirements were not met. Canada takes the view that the Shoal River Indians were an autonomous band within the meaning of the *Act* and, as a result, were not part of the eligible voting population. In the alternative, Canada submits that the Shoal River Indians were not habitually resident on or near, or interested in, IR 65 at the time of the surrender and were therefore ineligible to vote on that basis.

Although the *Indian Act* does not define a "band," the Commission has previously held that a body of Indians must live as a "collective community" under the auspices of the *Act*, in order to be considered a "band" within the meaning of the *Act*. Based on the evidence concerning the mutual intention of the Shoal River Indians and the followers of Chief The Key to live as separate autonomous entities, the Commission holds that the two were not one "band" for the purposes of the surrender provisions of the *Act*.

In the alternative, given the fact that the Shoal River Indians did not travel to IR 65 after 1902 for any purpose, and given their repeated disavowal of any interest in the reserve, the Commission holds that they were not habitually resident on or near, or interested in, the reserve at the time of the surrender. As a result, the Commission holds that the Shoal River Indians were not eligible to vote on the surrender and that its validity cannot be challenged on the basis of their failure to vote or to attend the meeting.

ISSUE 4: PRE-SURRENDER FIDUCIARY DUTY

The Supreme Court in *Apsassin* has established at least four benchmarks by which the Crown's conduct in the exercise of its pre-surrender fiduciary duty will be measured: where the Band's understanding of the terms of the surrender is inadequate; where the Crown has engaged in "tainted dealings"; where the Band cedes or abnegates its decision-making authority; and where the surrender is so foolish and improvident that it must be considered exploitative.

Further, as there is evidence that the dominion government faced conflicting pressures in the form of preserving the land for the Band, on the one hand, and, on the other, making it available for agricultural settlers, Canada bears the onus, according to Justice McLachlin in *Apsassin*, to demonstrate that it did not breach its fiduciary duty to the Band.

Counsel for the First Nation has submitted that representatives of the Department of Indian Affairs were under a duty to inform band members of various options, consequences, and factors relevant to the surrender in order to ensure that their understanding was adequate, within the meaning of *Apsassin*. Given the passage of 90 years since the surrender, the Commission concludes, as did the trial judge in *Apsassin*, that Canada is not required to establish by positive evidence that each and every matter raised by counsel for the First Nation was explained to the Band in 1909. Canada *is* required, in the Commission's view, to establish that the members of the Band understood that, by assenting to the surrender, they were giving up forever all rights to their reserve. Based on the evidence that Chief The Key reportedly understood in 1903 that a surrender involved a "taking" of land, and based on the actions of the Band in 1908 and 1909 in initiating surrender discussions and renegotiating the terms of the surrender, the Commission finds that the Band's understanding of the 1909 surrender was "adequate" within the meaning of *Apsassin*.

With respect to the issue of whether Canada's conduct was "tainted," the Commission notes that, in 1909, the dominion government had in place policies to encourage surrenders in order to facilitate non-aboriginal settlement. The Commission is also mindful of Inspector Graham's report that he "persuaded" the Band in January 1909 to surrender 17 sections of land instead of the 13 originally contemplated. The Commission finds on the evidence, however, that surrender discussions between the parties took place over a ten-month period and that, on one occasion, the Band renegotiated a term in its favour. The Commission also notes that the circumstances of this surrender did not include a concerted and sustained campaign of pressure on the Band to surrender its land. As a result, the Commission holds that Canada has discharged the onus upon it to establish that its dealings with the Band were honourable.

In determining whether The Key Band ceded or abnegated its decision-making power over the surrender to the Crown, the Commission has noted that there is no evidence that the Band was lacking in effective leadership at the time of the surrender, or that representatives of the department sought to obtain a surrender despite all obstacles. Rather, the Commission finds that the Band initiated surrender discussions, that it renegotiated one of the terms in its favour, that it made inquiries as to when the surrender might be expected, and that, after the fact, it took an interest in the receipt of sale proceeds. As a result, the Commission holds that the Band did not cede its decision-making power over the surrender to the Crown.

With respect to the issue of whether the surrender was "exploitative," the Commission takes the approach that the determination must be made from the perspective of the Band at the time of the surrender. In accordance with our decisions in previous inquiries, the Commission has looked at the impact of the surrender on the Band's way of life and, in particular, whether the land remaining after the surrender would be sufficient to satisfy its foreseeable agricultural needs. As a result, the Commission finds that, although the surrender took almost one half of the reserve, it did not take only the best land; moreover, the Band was left with some 8,000 acres of arable land and some 5,000 acres of grazing land. Given that the Band comprised 80 to 90 members at the time, and that it had cultivated only some 100 acres of the reserve, the Commission finds that the land remaining was sufficient to provide for the Band's foreseeable agricultural needs. As a result, the Commission holds that the surrender was not "exploitative" within the meaning of *Apsassin*.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

This report addresses a specific claim submitted to the Minister of Indian Affairs by The Key First Nation[1] on June 19, 1989, alleging that a 1909 surrender of 11,500 acres from Indian Reserve (IR) 65 near Norquay, Saskatchewan, was invalid because the Government of Canada had "breached its lawful and beyond lawful obligations in obtaining the alleged surrender of Key Reserve lands in 1909."[2] More specifically, the First Nation alleges that the surrender was obtained through undue influence, negligent misrepresentation, and non-compliance with the surrender provisions in section 49 of the 1906 *Indian Act*.

Following a review by the Department of Indian Affairs and Northern Development (DIAND) and the Department of Justice, Carol Cosco, Claims Analyst at Specific Claims West, DIAND, in a letter dated March 2, 1993, informed the Chief and Council of The Key Band of the federal government's position with regard to each allegation.[3] According to Ms Cosco's letter, the Government of Canada was of the view that the government officials of the day had not only acted according to the law, but had also acted in the best interests of the First Nation when arranging the surrender and sale of The Key Band reserve lands in 1909.

Two years after Canada's rejection of the claim, The Key First Nation formally requested that the Indian Claims Commission (ICC) conduct an inquiry into the 1909 surrender claim.[4] The Commissioners informed Canada of their decision to conduct the inquiry in September 1995.[5]

---

[1] Alternatively referred to as "The Key Band," the "First Nation," or the "Band," depending on the historical context.

[2] See Chief Dennis O'Soup to Pierre Cadieux, Minster of Indian Affairs, June 19, 1989 (ICC Documents, p. 661), and "Key Land Claim Submission," prepared for the Federation of Saskatchewan Indian Nations, undated (ICC Documents, p. 665).

[3] Carol Cosco, Specific Claims West, DIAND, to Chief and Council, The Key Band, March 2, 1993 (ICC Documents, pp. 729–32).

MANDATE OF THE COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[6] This Policy, outlined in DIAND's 1982 booklet *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept and negotiate claims that disclose an outstanding "lawful obligation" on the part of the federal government.[7] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

---

[4] Band Council Resolution (BCR) 226, March 2, 1995 (ICC file 2107-21-01).

[5] Daniel Bellegarde and James Prentice, Co-Chairs, ICC, to the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and the Honourable Allan Rock, Minister of Justice and Attorney General, September 25, 1995 (ICC file 2107-21-01).

[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991; reprinted in (1994) 1 ICCP xiii.

[7] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereafter *Outstanding Business*).

ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.[8]

This report contains the Commission's findings and recommendations on the merits of The Key First Nation's 1909 surrender claim.

---

[8] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179, 180.

PART II

HISTORICAL BACKGROUND

PRIOR TO TREATY

The people of The Key First Nation are descendants of the Saulteaux[9] – an Ojibway group that migrated west from the Great Lakes region towards the end of the 18th century. The history of the Saulteaux/Ojibway migration from Ontario to the prairies of western Canada has been addressed elsewhere and need not be recounted in detail here.[10] For the purpose of this report it is sufficient to recount that, as active participants in the fur trade, the Saulteaux moved west into the south-central regions of present-day Manitoba as their allies, the Cree, moved farther west into Saskatchewan and Alberta. According to the trade historian Arthur J. Ray, the Cree vacated the territory in southern Manitoba to maintain their position as middlemen in the fur trade within the Hudson Bay basin, as well as to exploit the provisioning trade that had developed as the competing fur trade companies became more dependent on the use of pemmican as a staple. Therefore, when the lands of southern Manitoba were depleted of furs, the Cree moved west to hunt the buffalo.[11]

This migration eventually resulted in the Saulteaux extending themselves from southern Manitoba, northwest into the Swan River and Cumberland districts of west-central Manitoba, and into Saskatchewan along the Assiniboine River as far its confluence with the Souris River. In this manner, the Saulteaux came to reside along the forest fringe or "parklands" of southern

---

[9] The Saulteaux are one of four tribes that together constitute the Ojibway Nation. The others are the Ottawa, Mississauga, and Potawatomi tribes. The Saulteaux first came into contact with European traders on the eastern shores of Lake Superior. The term "Saulteaux" was originally applied to one particular group of Ojibway people that had persistent dealings with the French fur traders near present-day Sault Ste Marie. The traders called them "Saulteur" – the French word for "people of the rapids" – referring to their origins at Sault Ste Marie. The plural form of the term is "Saulteaux." For more information, see Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988), 93–101.

[10] For a concise account of Ojibway migrations during the historical era, see Laura Peers, *The Ojibway of Western Canada, 1780–1870* (Winnipeg: University of Manitoba Press, 1994), 3–61.

[11] See Arthur J. Ray, *Indians and the Fur Trade: Their Roles as Hunters, Trappers and Middlemen in the Lands Southwest of Hudson Bay, 1660–1870* (Toronto: University of Toronto Press, 1974), 102.

Manitoba and Saskatchewan – the area of land where the forest and prairie converged.

Once established in the parkland/forest fringe, the Saulteaux adapted some of the cultural traits of their allies, the Plains Cree and Assiniboine. From the shelter of the parkland, they entered the plains to participate in the seasonal buffalo hunt. The Saulteaux, however, did not fully abandon the cultural traits practised during their residency in the Great Lakes district – fishing continued as a significant source of foodstuffs, and medicine rituals such as the Midewiwin lodge remained in common use. The traditional clan organization of membership, based on patrilineal inheritance organized into the primary totems of the crane, catfish, bear, martin, wolf, and loon clans, also remained intact.[12] In general, Saulteaux life remained tied to the annual cycle of subsistence based on set patterns of hunting, fishing, and plant gathering, a system compatible with participation in the fur trade.

The Followers of Chief Ow-tah-pee-ka-kaw – "The Key"

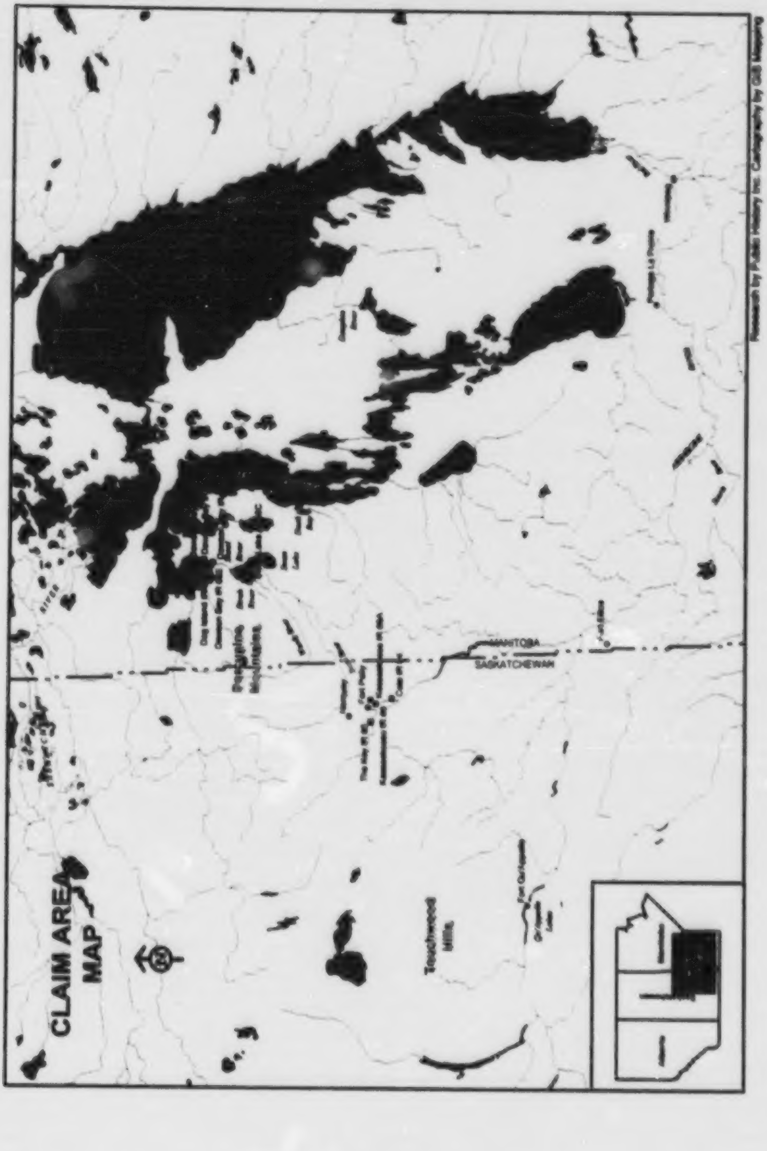
According to one historian of The Key First Nation, the followers of Chief Ow-tah-pee-ka-kaw – "He Who Unlocks" or "The Key" – had resided along the Shoal River in the Dawson Bay/Swan Lake region of southwestern Manitoba since the middle of the 19th century.[13] The waterways west of Lake Winnipeg and the Red River settlement – particularly the Assiniboine River, Dauphin River, Lakes Manitoba and Winnipegosis, and the Swan and Saskatchewan rivers – had long served as the means of transportation for the fur trade. As such, The Key Band's residency along one of these prominent water routes provided its members with ready access to various fur-trading posts. The advantageous location at Shoal River also provided the group under Chief The Key with new neighbours who would become band members. According to the Reverend Harry B. Miller, several members of the Brass family – descendants of an Orkneyman employee of the Hudson's Bay Company (HBC) and his aboriginal wife – chose to settle with the Band after their retirement from active service with the company:

> Peter and Susan Brass parented a family of nine; five boys and four girls. The boys were Peter, John, George, William and Thomas ... All five of the boys, it would appear, entered either the apprentice program or the labour force of the Hudson's Bay

---

[12] See Alan D. McMillan, *Native Peoples and Cultures of Canada* (Vancouver: Douglas & McIntyre, 1988), 94–95, 140–41.

[13] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 16 (ICC Exhibit 6).


CLAIM AREA MAP
MANITOBA
SASKATCHEWAN
Porcupine Mountains
Touchwood Hills
Fort Qu'Appelle
River
Research by Public History Inc. Cartography by GIS Mapping

> Company, through which experience they acquired the skills that, in later life, were to prove so beneficial as they set about to build homes, schools, mission house, and church; and to establish themselves on the Key Reserve ... Following the time of apprenticeship, each served the Company throughout the Swan River district until retiring and joining Chief Key and his followers at Shoal River.[14]

The membership of The Key Band included both Saulteaux and mixed-blood individuals at the time of treaty. Both groups lived in harmony with each other under the acknowledged leadership of Chief The Key.

Adherence to Treaty 4

The early 1870s represented a period of great transition among the Indian Nations that resided within the 75,000 square mile area of Treaty 4. Once the buffalo disappeared and white settlers moved into the area, some bands took steps to convert from the life of the hunter-gatherer to reserve agriculturalists. The increasing scarcity of buffalo and other game led to periods of hardship, even starvation, and greater competition for the remaining food resources. Furthermore, the sale or transfer of their homeland from the administration of the HBC to the jurisdiction of the Dominion of Canada in 1869–70 had created a feeling of great unease among the aboriginal peoples of the plains. In an effort to provide their people with the means to survive within this ever-changing climate, many Indian leaders subsequently called on the Queen to negotiate binding treaties that would assist their people in adapting to the new realities of western expansion while at the same time protecting their rights to the unoccupied lands of western Canada.[15] The Government of Canada also sought to conclude peaceful arrangements with the aboriginal peoples occupying "Rupert's Land" – the vast territory acquired from the HBC. As a result, the first of the "numbered treaties" between Canada and the Saulteaux and Ojibway Indians of southern Manitoba and northwest Ontario – Treaties 1, 2, and 3 – were concluded between 1870 and 1873.

During the summer of 1874, the dominion government initiated the process by which Treaty 4 was to be signed with the Indian Nations residing within the "Fertile Belt" located along the southern portion of the North-West

---

[14] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1894–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 9 and 16 (ICC Exhibit 6).

[15] E. Blair Stonechild and Bill Waiser, *Loyal till Death: Indians and the North-West Rebellion* (Edmonton: Fifth House Publishers, 1997), 5–8. See also Olive P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: McClelland & Stewart, 1992), 273–83.

Territories, within present-day Saskatchewan and southwestern Manitoba. Authorization was granted by Order in Council PC 944, dated July 23, 1874:

> On a memorandum, dated 20th July 1874, from the Honorable the Minister of the Interior, stating that he has had before him a Minute of the Council of the North West [sic] of the 14th March last, recommending that Treaties should this year be concluded with the Tribes of Indians inhabiting the Territory therein indicated, lying West of the Boundary of Treaty No. 2, and between the International Boundary line and the Saskatchewan.
>
> That he has also had before him several Despatches from the Lieutenant Governor of later date urging the necessity of these Treaties.
>
> That looking to these representations and to the fact that the Mounted Police Force is now moving into the Territory in question with a view to taking up their winter quarters at Fort Pelly, and considering the operations of the Boundary Commission which are continually moving westward into the Indian Country, and also the steps which are being taken in connection with the proposed Telegraph Line from Fort Garry westward, all of which proceedings are calculated to further unsettle the Indian mind, already in a disturbed condition; he recommends that three Commissioners be appointed by His Excellency the Governor General for the purpose of making Treaties during the current year with such of the Indian Bands as they may find it expedient to deal with.[16]

At the time, Alexander Morris was Lieutenant Governor of the area that then comprised Manitoba and the North-West Territories, including present-day Saskatchewan and Alberta. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the HBC, Morris was commissioned by the Government of Canada to conclude the proposed treaty with the various Indian Nations of the Fertile Belt.

In August 1874, the Treaty Commissioners departed to meet with the Indian Nations that had agreed to convene at Fort Qu'Appelle the following month. From September 8 until September 15, 1874, the three Treaty Commissioners discussed the terms of the proposed treaty with the assembled Chiefs. Initially reluctant to agree to the terms offered by the Crown's representatives, the Indian leaders eventually accepted the promises contained within the treaty agreement and, in exchange, agreed to cede their people's rights to the lands within the treaty boundaries. Their agreement, however, was not given without some apprehension. Morris's reports noted some of the Chiefs' concerns that the position of the HBC was unfairly advantageous, and that the rights of existing and future generations of the aboriginal peoples were not adequately protected. Morris attempted to allay these concerns in discussions with the Chiefs as he outlined the government's position with regard to the treaty:

---

[16] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 3 (ICC Exhibit 15).

> What the Queen and her Councillors would like is this, she would like you to learn something of the cunning of the white man. When fish are scarce and the buffalo are not plentiful she would like to help you put something in the land; she would like that you should have some money every year to buy things you need. If any of you would settle down on the land, she would give you cattle to help you; she would like you to have some seed to plant. She would like to give to you every year, for twenty years, some powder, shot and twine to make nets of. I see you here before me to-day. I will pass away and you will pass away. I will go where my fathers have gone and you also, but after me and after you will come our children. The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five.[17]

On September 15, 1874, the final day of the conferences, the Commissioners convinced the assembled Cree and Saulteaux Indians to sign Treaty 4, which was substantially identical to Treaty 3, concluded the year before. Morris recorded the event as follows:

> The Chiefs then signed the treaty, after having been assured that they would never be made ashamed of what they then did.
>
> One of the Chiefs on being asked to do so signed; the second called on said he was promised the money when he signed, and returned to his seat without doing so. The Lieutenant-Governor called him forward – held out his hand to him and said, take my hand; it holds the money. If you can trust us forever you can do so for half an hour; sign the treaty. The Chief took the Governor's hands and touched the pen, and the others followed. As soon as the treaty was signed the Governor expressed the satisfaction of the Commissioners with the Indians, and said that Mr. Christie and Mr. Dickieson, the Private Secretary of the Minister of the Interior, were ready to advance money presents, but the Indians requested that the payments should be postponed till

---

[17] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 92–93 (ICC Documents, p. 30).

> next morning, which was agreed to. The Chiefs then formally approached the Commissioners and shook hands with them, after which the conference was adjourned.[18]

The treaty document included the following provisions:

> The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. ... [The treaty then sets forth a metes and bounds description of the land ceded.]
>
> As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for those belonging thereto, unless for some special reason it be found objectionable.[19]

The treaty further provided that reserves were to be selected by officers of the government in consultation with the interested band, "to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families" (128 acres per person). Treaty 4 also contained a number of provisions providing for the protection of reserve lands after the reserves had been established:

> ... the aforesaid reserves of land, or any part thereof, or any interest or rights therein, or appurtenant thereto, may be sold, leased or otherwise disposed of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained, but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[20]

The treaty commitments regarding agricultural assistance were also very specific:

---

[18] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 123 (ICC Documents, p. 45).

[19] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5–8 (ICC Exhibit 15).

[20] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Exhibit 15).

> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, and also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit-saw, the necessary files and one grindstone, all the aforesaid articles to be given, once and for all, for the encouragement of the practice of agriculture among the Indians.[21]

Many of the First Nations within the boundaries of Treaty 4 agreed to this document in 1874. It would be a full year, however, before Chief Ow-tah-pee-ka-kaw (The Key) brought his people within the treaty.

THE KEY BAND ADHESION TO TREATY 4

In the summer of 1875, the Government of Canada directed W.J. Christie and M.G. Dickieson to "obtain the adhesion of other bands which had not been present at Qu'Appelle the previous year."[22] Having taken adhesions at Fort Ellice, Qu'Appelle Lake, and Fort Pelly between August 19 and September 18, the Treaty Commissioners and their entourage arrived in Shoal River on September 22, 1875. Two days later, on September 24, Commissioners Christie and Dickieson took adhesions to Treaty 4 from the Cree and Saulteaux Indians inhabiting that area. The adhesion presented to the Indians stipulated that those signing agreed to accept "the several provisions, payments and reserves" of the treaty signed at Qu'Appelle in 1874. Signing on behalf of the 27 Saulteaux Indian families assembled for the occasion was Chief The Key.[23]

In their report to the Minister of the Interior, Treaty Commissioners Christie and Dickieson remarked that The Key Band was located to the "west side of the Woody River, which rises in the Porcupine Mountains and falls into the

---

[21] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7 (ICC Exhibit 15).

[22] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Belfords Clark, 1880; Coles Reprint, 1971), 79 (ICC Document, p. 23).

[23] See W.J. Christie and M.G. Dickieson, Treaty Commissioners, to the Honorable Minister of the Interior [David Laird],October 7, 1876, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1876*, xxii (ICC Documents, pp. 55–63), and *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 11–12 (ICC Exhibit 15). Although the Christie/Dickieson report gives the population of the Band as 127, a recapitulation of the numbers paid with The Key in 1876 shows a total of 132 paid. See "Payments to Indians at Fort Pelly and Shoal Lake," *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1876*, xxx (ICC Documents, p. 64).

Swan Lake to the west of the Swan River,"and that they "[had] been settled there for quite some time, have ground under cultivation, and possess a number of cattle and horses." Speaking of the entire group taking adhesion at Shoal River (the Key and Keeseekoose Bands), Christie and Dickieson reported that "[b]oth these Bands have made considerable progress in farming, as is evinced by the number of cattle and horses owned by them, and are anxious to receive assistance."[24]

The Key Band Reserve Surveyed at Swan River in 1878

According to a report submitted in 1876 by Angus McKay, the Indian agent for Treaty 4, the Band under "Chief Oot-ap-ap-ehk-ah-he-kaw, Or, He Who Unlocks" comprised 34 families, residing along the south bank of the Woody River, in possession of "quite a number of cattle – a few horses and some small potato gardens."[25] The Band had probably been residing at this location for many years, and it is not surprising that the land was included in the list of proposed reserves given to surveyor William Wagner in 1875. Specific instructions for surveying a reserve for The Key Band were not issued at that time, however, because Wagner had several other reserves to survey that season and would not be able to complete all the work.[26] As a result, The Key Band waited several more years before receiving reserve lands.

In the meantime, dissension concerning reserve selection emerged within several of the bands – including The Key Band – that were waiting for their reserves to be surveyed. By May 1877, however, Lieutenant Governor David Laird[27] had met with the bands and was able to report that most of the differences had been settled and the bands were ready to have their reserves surveyed.[28] With regard to The Key Band, Laird reported that its members no longer wished for a reserve to be located at their traditional settlement on the south bank of the Woody River, but had identified lands at a new location "on Swan River, about 15 miles above Swan Lake." In Laird's opinion, the location of the newly proposed reserve was ideal, being "about 20 miles from the telegraph line" and out of the way of incoming settlement. He therefore supported the Band's selection.[29]

---

[24] W.J. Christie and M.G. Dickieson, Treaty Commissioners, to the Honourable Minister of the Interior [David Laird], October 7, 1875, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1875* (ICC Documents, p. 60).

[25] A. McKay, Winnipeg, to Superintendent General of Indian Affairs (SGIA), October 14, 1876, National Archives of Canada (hereafter NA), RG 10, vol. 3642, file 7581 (ICC Documents, p. 80).

[26] W.J. Christie to Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 14–15).

[27] David Laird was the Minister of the Interior/Superintendent General of Indian Affairs from 1873 to 1877. In 1877, David Mills replaced Laird as Minister of the Interior, though Laird retained the office of Lieutenant Governor of the North-West Territories.

[28] David Laird, Lieutenant Governor and Indian Superintendent, Swan River, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 83 and 86).

In January 1878, Wagner was sent to the Swan River district to begin surveying The Key Band reserve. On inspecting the lands identified by the Band, he concluded that the tract was not appropriate for a reserve and persuaded the Indians to select higher ground farther up river, but still near enough to Swan Lake to access their fishing grounds. At this location, about 90 miles northeast of Fort Pelly, he surveyed a reserve of 31,300 acres:

> The Band of which The Key is Chief consists of Indians and Halfbreeds living on two separate localities near the entrance of the Swan River into the Swan Lake.
>
> The land[s] around both of these settlements are very low and are regularly inundated every year with the exception of the rising grounds on which the houses are located. This was one of the reasons which induced the members of the Band to select a more high situated locality for their future abode. ...
>
> The land as a general rule is rough & very broken by many swamps with the exception of about 1000 acres at the South East corner, where the land can be brought under Class 2. This space is extensive enough for all their wants.
>
> The timber consists chiefly of Poplar with a fair sprinkling of Spruce. Around the hay marshes are willows ... .[30]

Wagner's optimism about the utility of this reserve soon proved to be incorrect.

The Reserve at Swan River

Although certain members of the Band had been settled there for some time, Chief The Key moved onto the reserve at Swan River in the spring of 1878. According to a report issued by Indian Agent Alan McDonald in November 1878, the Chief "had moved to the Reserve in the spring and has already built his dwelling storehouse and stables." Likewise, a "few of his followers had broken up land and are fully determined on making the Reserve their home."[31] In his report the following year McDonald was less specific, noting merely that several Chiefs – including The Key – had "established themselves on their reserves, and they, and the members of their bands, have commenced to cultivate the soil ...."[32]

---

[29] David Laird, Lieutenant Governor and Indian Superintendent, Swan River, to Minister of the Interior, May 9, 1877, NA, RG 10, vol. 3649, file 8187 (ICC Documents, pp. 83 and 86).

[30] William Wagner, Dominion Land Surveyor (DLS), "Field Notes of Survey of Indian Reserves Treaty No. 4, The Key's Band, Surveyed during January 1875," June 1878 (ICC Documents, pp. 87–90).

[31] Alan MacDonald, Indian Agent, to Superintendent General of Indian Affairs, November 24, 1878, Canada, Parliament, *Sessional Papers*, 1879, No. 7, "Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1878," 65–66 (ICC Documents, p. 99).

Despite evidence showing the Band's willingness to pursue farming and stock raising on its reserve at Swan River, certain unforeseen events in 1880 caused the Department of Indian Affairs to decide to relocate the reserve. Inspector T.P. Wadsworth's annual inspection in the spring of 1880 coincided with a period of significant flooding in the Swan River district. Wadsworth determined that such flooding would likely occur on a regular basis, and that the best course of action would be for the entire Band to relocate. His report to the Superintendent General stated:

> I found the Key located in a vast wooded marsh, and living miserably on a few turnips and a little fish. This reserve is useless, as the flies are so desperately hard on the cattle, and there is no farming land. The little patches they have are small islands in the morass. Efforts have been made by Agent Macdonald to move this reserve to the neighbourhood of Farm No. 2 [near Fort Pelly] but without avail; after a long conversation with the "Key," he has promised to meet me on October 26, at Farm No. 2 and give me his decision. I think he will move in early spring, and I have promised him part of [farming instructor] Johnston's Farm for one year to plant his seeds in. Key has seven Government cattle, and the band own 37 private cattle.[33]

As indicated in Wadsworth's inspection report, Chief The Key had been persuaded by Agent Alan MacDonald to inspect the lands along the Assiniboine River near Fort Pelly, Saskatchewan. According to the oral history of the Band, a scouting party was formed to travel to the Fort Pelly district, view the land there, and report back to the rest of the Band.[34] Although a record of events following this inspection is lacking, it is evident that, by the summer of 1882, a decision had been made to abandon the reserve along the Swan River.

The willingness to relocate along the Assiniboine in the Fort Pelly district, approximately 90 miles southwest of their traditional homeland, was not shared by all band members. In fact, a majority of Chief The Key's followers, under Headman John Beardie,[35] chose to remain within the Shoal River area.

---

[32] Alan MacDonald, Indian Agent, to Superintendent General of Indian Affairs, November 2, 1879, Canada, Parliament, *Sessional Papers*, 1879, No. 7, "Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1879," 108–09 (ICC Documents, pp. 100–01).

[33] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 27, 1881, excerpt included within the report of Sir John A. Macdonald, SGIA, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1881*, xviii, xxxiv (ICC Documents, p. 104).

[34] An account of The Key Band's "Great Trek" – based on the oral accounts of The Key Band elders – is included in Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville: Sask.: Seniors Consulting Service, 1984), 18.

The Creation of The Key Band Indian Reserve 65

The Department of Indian Affairs was made aware of the circumstances surrounding the split in The Key Band in August 1882, when Indian Agent H. Martineau reported an encounter he had had with the Shoal River group under Headman John Beardie. On information provided to him by Beardie, Martineau reported that "Chief 'La Clef' or 'The Key' with a few of his followers has abandoned his Reserve at Swan River, in hopes of getting another reserve at [Fort] Pelly or thereabout."[36] A report from Indian Agent L.W. Herchmer, dated October 10, 1882, indicates that the "new Reserve at Pelly" had been established by that time and that the Indians residing there were quite comfortable.[37] Although lands had been selected by Chief The Key and his followers, a survey had not yet been conducted.

On December 20, 1882, the Prime Minister and Superintendent General of Indian Affairs, Sir John A. Macdonald, requested a full review of the matter. In reply, E.T. Galt, the Assistant Indian Commissioner at Winnipeg, reported the following:

> In answer to your letter of the 20th ult, No. 4576 relative to the land on which the Indians of Chief Key's band have their improvements, I have the honor to state that the Reserve originally set apart for them, situate North East from Fort Pelly on the West Side of Swan River ... has been totally abandoned. Twelve of the families have taken up a location outside and a short distance to the West of the Hudson's Bay lands at Fort Pelly. It was to this point that the Indians were taken by the Agent, they have substantial improvements at this point. ...
>
> As settlers are coming in and settling rapidly in the neighbourhood of Fort Pelly it is desirable in order to prevent complications to have Kee-see-koos' Reserve surveyed (it adjoins that of Cote's) also that of The Key if the Department should think proper to grant them the land on which the twelve families have settled.[38]

In accordance with this request, Indian Commissioner Edgar Dewdney communicated with Lindsay Russell, the Deputy Minister of the Interior and Surveyor General of Canada, to request that a survey be made of the new lands occupied by The Key Band.[39] Approval was granted and, in the spring of 1883, A.W. Ponton, the Dominion Land Surveyor (DLS), began surveying a number of reserves in the Treaty 4 area. Reporting in July of that year, Ponton informed his superiors that his work on the surveys for Chiefs The Key and Keeseekoose near Fort Pelly would be postponed until the cold weather set in, as it would be easier to traverse the river front and swamp areas.[40] Notwithstanding this delay, the survey of The Key IR 65 was completed by the end of 1883, at which time survey plans were submitted to the Indian Commissioner at Regina.[41] The confirming Order in Council described the new reserve as follows:

---

[35] He is also referred to in some documents as "John Beardy," but will be referred to in this text as "Beardie."

[36] H. Martineau, Indian Agent, to SGIA, August 21, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5 (ICC Documents, p. 114). See also H. Martineau, Indian Agent, to James Graham, Indian Superintendent, Winnipeg, August 18, 1882, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 105–07).

[37] L.W. Herchmer to Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111).

[38] E.T. Galt, Assistant Indian Commissioner, to the Right Honorable Superintendent General of Indian Affairs, January 29, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 115–16).

> This reserve is situated on the left bank of the Assiniboine River, about two miles west of Fort Pelly, on the old cart trail to Touchwood Hills. ...
>
> This reserve is generally thickly wooded with poplar, balm of gilead and groves of spruce and tamarac. The soil is chiefly of a sandy loam, the stretches of prairie in the vicinity of the reserve being of superior quality. There are extensive hay swamps in the north-east and south east corners of the reserve.[42]

As surveyed, the reserve fulfilled treaty land entitlement for 190 people (190 x 128 acres per person = 24,320 acres), even though only 83 band members – including the Chief and three headmen – resided there at the time. The size of the new reserve was based on the assumption of the Department of Indian Affairs that the Band would remain intact, residing together at one location.[43] As a result, the department initially refused to grant a reserve to the Shoal River faction in the belief that it would eventually join The Key at Fort Pelly. IR 65 was subsequently confirmed by Order in Council PC 1151 dated May 17, 1889, and withdrawn from the operation of the *Dominion Lands Act* by Order in Council dated June 12, 1893.[44]

---

[39] E. Dewdney, Indian Commissioner, to L. Russell, Deputy Minister of the Interior, March 19, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 105–07).

[40] A.W. Ponton, DLS, to Edgar Dewdney, Indian Commissioner, July 13, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 121–24).

[41] See Edgar Dewdney, Indian Commissioner, to SGIA, December 14, 1883, NA, RG 10, vol. 7770, file 21117-2 (ICC Documents, pp. 125–26).

[42] Order in Council PC 1151, May 17, 1889 (ICC Documents, p. 194).

[43] See L.W. Herchmer, Indian Agent, to the Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111); L.W. Herchmer, Indian Agent, to the Indian Commissioner, March 16, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 133–35); and T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 93–94 (ICC Documents, pp. 131–32).

[44] Order in Council PC 1694, June 12, 1893 (ICC Documents, pp. 272–74).

THE SHOAL RIVER FACTION AFTER 1881

As we have seen, at 24,320 acres, the original Key Band IR 65 fulfilled treaty land entitlement for 190 people, although only 83 band members lived at the Fort Pelly location.[45] The majority of band members opted to remain in their traditional homeland near Swan River, Manitoba. The position of these people was explained in 1882 by Headman John Beardie:

> We the undersigned want a Reserve to live on at Shoal Lake. We were told and we still hear that all Indians get a Reserve where they were brought up and this is our reason for wishing a Reserve here as we don't wish to leave our birth place.
>
> Further we wish it known that we never said or promised to go to Pelly, the Chief "Key" left our late Reserve without our consent so he can have a reserve at Pelly, but as for us we don't wish or intend to follow him there, therefore we wish you as agent to lay our case before the Gov't.[46]

The followers of John Beardie reiterated their opposition to the relocation plan in 1884:

> We belonged formerly to Chief Key's Band numbering altogether thirty seven heads of families. Our Agent had a Reserve given us on the banks of the little Swan River, as you will see on the Map showing the Indian Reservations. During the year of exceptional high water, our Reserve was somewhat flooded, and became unfit for culture: at present the same Reserve is perfectly dry and the soil good; large potatoes and other vegetables have been raised there in previous years with great success. Unfortunately, for us, our Agents paid us a visit during the high water and as they had a rough time coming through, formed their opinion of our Reserve accordingly. They told us that it would be impossible for us to subsist on our Reserve, as nothing would grow, and besides that the roads were too bad for bringing in supplies, &c, &c. After some hesitation they at length prevailed on our Chief, with twelve followers to go up to Fort Pelly and have a Reserve there. A third of those who went up were halfbreed Indians who could work [2 words unreadable] &c. *We the majority (of twelve) numbering twenty-four heads of families refused to go and further informed our agent not to include us in the surveying of the Reserve at Pelly as we intended to remain down here. Since then we have been asking for a Reserve to be given us here, but so far we have had not even the satisfaction of a reply.*
>
> The place we have now selected for a Reserve is at the mouth of Shoal River where we have every advantage. The place affords good Fishing all the year through the land

---

[45] T.P. Wadsworth, Inspector of Indian Agencies, Department of Indian Affairs, Edmonton, to Superintendent General of Indian Affairs, September 17, 1884, Canada, Parliament, *Sessional Papers*, 1885, No. 3, "Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884," 93 (ICC Documents, p. 157).

[46] John Beardie, Headman, to Indian Agent, Treaty 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

> is high and good, Timber plentiful, suitable for all our purpose [sic] – and our hunting grounds are near. The facilities for receiving supplies &c are advantageous, as we have water communication from here to the Railroad station at Westbourne, eighteen miles from Portage la Prairie. Mr. Indian Agent Martineau's supervision extends fifty miles from here, that is the Reserve at Duck Bay on the same lake as we are situated ....
>
> We therefore request You to have a Reservation laid out for us as early as possible, at the desired point. We have already lost so much time in awaiting replies &c [sic]; that we intend to begin working this coming spring. With your order seed could as yet be given us, in time for spring use, but of course, no time should be lost.[47]

Initial plans to allow a reserve at Shoal River were cancelled by the department, however, because the land was deemed unsuitable for agriculture. According to Indian Agent L.W. Herchmer in his 1885 report, "there is no use giving a Reserve at Shoal River as there is no land fit to work in that vicinity, and it will never be required for White Settlement, consequently, as long as these Indians choose to live by fishing they could remain at Shoal River, and when desirous of becoming civilized they could join their Reserve at Pelly."[48]

In Herchmer's view, it was merely a matter of time before the entire Band became settled on IR 65 at Fort Pelly.[49] He was wrong. Although they had no reserve, the Shoal River people remained where they were, and there is no evidence in the documents assembled for this inquiry that any of them relocated to the Fort Pelly reserve. In fact, there is evidence showing that those members remaining at Shoal River eventually thrived by hunting, fishing, and raising cattle.[50] Furthermore, in February 1885, the members of the Shoal River faction appeared to repudiate the leadership of Chief The Key, as well as any interest in IR 65, in a letter to Inspector E. McColl that echoes their letter of the previous year to Deputy Superintendent General Vankoughnet:

> We belonged formerly to the Keys band, numbering altogether nineteen heads of families. A Reserve was given us on the banks of the Swan River. Unfortunately during the exceptional high waters the Reserve was flooded, and unfit for culture. At present the same Reserve is high and dry and the soil good. ... During the high waters our agents

---

[47] John Beardie et al., Shoal River, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, January 1, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 129). Emphasis added.

[48] L.W. Herchmer, Indian Agent, to Indian Commissioner, Department of Indian Affairs, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 142–45).

[49] L.W. Herchmer, Indian Agent, to Indian Commissioner, Department of Indian Affairs, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 143).

[50] W.E. Jones, Acting Indian Agent, to Indian Commissioner, Department of Indian Affairs, November 3, 1888 (ICC Documents, p. 159).

> paid us a visit, and as they had a rough time coming through, they formed their opinions accordingly, And told us it would be impossible for us to live there, as nothing would grow. ... They at length persuaded our Chief "The Key" together with twelve followers to go up to Pelly, and have a Reserve surveyed for them there. We the majority having nineteen heads of families refused. We told our agent not to have our names included in the surveying of the Reserve, as we were going to remain here, probably our names may have been included, but that is not our fault ...[51]

In 1888, J.A. Markle, the agent for the neighbouring Birtle Agency, paid treaty annuities to the Shoal River people at the site where they had built their homes, and submitted the following report:

> I visited that portion of the "Keys" Band residing at Shoal River, and as you are aware, these Indians have for some years offered opposition to be removed to the Reserve set apart for them near Fort Pelly and have asked that one be given them on the Shoal River, a report of my visit, and an opinion as to whether it would be advisable to meet their wish, may not be out of place....
>
> I found all to be well clothed, in good health, and their only trouble seemed to be that the Department would insist on their removing to the Reserve near Fort Pelly. They informed me that for ten months of each year they are able to take all the fish they can possibly use, and no one need be in want the other two months if they only dry sufficient fish for that time.
>
> Ducks are also plentiful during the summer, and as this is a good fur bearing part of the country, they had sold during the past year fur to the value of $5000.00 and as near as I could learn had earned fully $1000 more in other work. There has only been one death in the past year. I am of the opinion it would be a mistake to remove these Indians to the Reserve near Pelly even providing they were willing to come, and if it were done they would have to be fed at least ½ of the year and I am of the opinion that, if another good place can be found in that district, where fish is easily taken, it would be to the best interest of the Indians and Department to set apart another Reserve and allow any who are now on the Reserve near Fort Pelly to remove to it if they so wish, as I believe the Indians who have Reserves similarly situated are in a much better position than those who have Reserves inland.[52]

Reserves 65A to 65E in and around Shoal Lake and Dawson Bay

The department apparently heeded Markle's advice, and over the succeeding years established a number of small reserves for the use of the people at Shoal River. In September 1889, J.C. Nelson surveyed a one-square-mile fishing station at the north end of Shoal River on Dawson's Bay.[53] Nelson's survey plan No. 218 indicated that the reserve – Dawson Bay IR 65A – was intended to be a fishing station for the "Indians of the Pelly Agency." The reserve was confirmed by Order in Council on August 5, 1930, and set apart merely for "use of the Indians."[54] In 1889, a small plot (5.6 acres) within this area was occupied as a trading post by a squatter named Hartman, but was later abandoned by him. Nelson surveyed the "Hartman Claim" in 1893 and it was confirmed by Order in Council PC 1216 on July 11, 1895, as an addition to IR 65A.[55]

---

[51] John Beardie, Headman "for the Band," to E. McColl, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

[52] J.A. Markle, Indian Agent, Department of Indian Affairs, to Indian Commissioner, Department of Indian Affairs, September 5, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, p. 147).

In December 1893, Nelson surveyed several "new reserves" at Swan Lake and Dawson's Bay. These reserves were

> Dawson's Bay IR 65B, containing 2,272 acres
> Swan Lake IR 65C, containing 1,939 acres
> Dog Island IR 65D, containing 275 acres
> Dawson Bay IR 65E, containing 53.40 acres.[56]

Nelson considered that all the reserves belonged to The Key Band:

> The reserve now consists of one larger and six smaller portions of land. The principal part is situated at Pelly and was surveyed by Mr. A.W. Ponton, DLS in the year 1883. The other parts surveyed this season, as situated at the north-westerly end of Lake Winnipegosis, with the exception of a small area at the mouth of Birch River on the westerly shore already mentioned of Swan Lake ...[57]

The Orders in Council confirming these reserves were issued in 1895. Those for IR 65B and 65D specify that the lands were set apart for the "Band of Chief The Key."[58] IR 65C was "set apart and reserved for the purpose of an

---

[53] W. Austin, Department of Indian Affairs, to Deputy Superintendent General of Indian Affairs, December 29, 1890, NA, RG 10, vol. 3807, file 52936 (ICC Documents, p. 245).

[54] Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[55] John C. Nelson, In Charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 16, 1893, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1894* (ICC Documents, pp. 267–68); G.A. Poupore, Director, Lands and Membership, Department of Indian Affairs, to W.V. Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, May 27, 1976 (ICC Documents, p. 638); Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[56] W.V. Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, to R.W. Winstone, Chief, Crown Lands, Department of Renewable Resources and Transportation Services, Winnipeg, Manitoba, June 17, 1977 (ICC Documents, p. 642).

[57] John C. Nelson, In Charge Indian Reserve Surveys, to Superintendent General of Indian Affairs, December 16, 1893, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1894* (ICC Documents, pp. 267–68).

[58] Order in Council, July 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 278) [note: OC refers to this reserve as 65d in error]; Order in Council, September 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 282).

Indian Reserve,"[59] and IR 65E was set aside for the "Indians of Treaty No. 4."[60] After 1895, the annual reports for the Pelly Agency indicate that both locations maintained schools and that the Church of England had established missions that were well attended.[61]

Separate Annuity Paylist for the Shoal River "Band" in 1902

Up to and including the 1901 annuity payments, both portions of The Key Band were listed together on one annuity paylist, which required that the members of the Shoal River faction travel to Pelly for their payments. In 1885, these individuals had complained about this routine, calling it "very hard treatment."[62] It appears that the only exception to this practice occurred in 1888, when Agent Markle paid the Shoal River people in their community. In 1902, however, the two groups were shown on separate paylists, and the administration of the Shoal River people was transferred to a different agency. Indian Agent R.S. McKenzie wrote:

> The supervision of that portion of Key's band residing at Shoal River has been transferred to the Lake Manitoba Inspectorate as it was impossible to give them the necessary attention owing to the condition of the trails and the distance [from the Agency headquarters].[63]

The heading of the 1902 paylists for the Shoal River reads: "Shoal River Band paid at Shoal River Reserve, August 18, 1902." John Beardie was paid as headman.[64]

The historical records of the department do not specifically address the issue of the designation of Shoal River as a separate band, although Inspector Graham apparently believed that such an action would require a "departmental order."[65] In 1977, W.V. Lowry, the department's Assistant Regional Director of Lands, Membership and Estates, reported that, "[a]lthough the Shoal River Band was paid with The Key Band until 1902, the two bands are now recognized as separate groups."[66]

---

[59] Order in Council, July 13, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 275).

[60] Jim Gallo, excerpt from "TLE Report – Shoal River," 1980 (ICC Documents, p. 644).

[61] W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, August 5, 1895, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1896* (ICC Documents, pp. 279–80); W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, August 9, 1898, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899* (ICC Documents, pp. 291–92); W.E. Jones, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, August 30, 1899, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1899* (ICC Documents, pp. 300–01).

[62] John Beardie, Headman [and one other] "for the Band," to E. McColl, February 20, 1885, NA, RG 10, vol. 3573, file 215 (ICC Documents, pp. 138–41).

[63] R.S. McKenzie, Indian Agent, Department of Indian Affairs, to Superintendent General of Indian Affairs, July 14, 1902, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 160 (ICC Documents, p. 326).

[64] Department of Indian Affairs, Annuity paylist, August 8, 1902, DIAND, Genealogical Unit (ICC Documents, pp. 329–36).

No evidence was produced to show that the two Bands ever authorized any distribution of the reserve land between them. In 1924, however, the Shoal River Band, "resident on our Reserve No. 65a," surrendered IR 65D and IR 65E in exchange for additions to IR 65A and IR 65B and a new reserve, IR 65F.[67] The Orders in Council confirming the additions and new reserve stated that the lands were "set apart for the use of the Indians" and did not mention a particular band by name.[68]

LIFE ON THE KEY BAND INDIAN RESERVE 65 BEFORE 1909

As discussed above, The Key Band had resided at Shoal River for many years before relocating to the Fort Pelly district. The historical record shows that, at the time they entered Treaty 4 in 1875, band members "had ground under cultivation, and possess[ed] a number of cattle and horses."[69] The agricultural and ranching progress the Band had made to this date was a product of its own efforts. One of the basic terms of Treaty 4, however, provided that bands would receive agricultural implements, seed, and certain livestock to assist them in their transition to farming and stock raising. This issue was addressed by the Treaty Commissioners in their report on the adhesion of the Indians at Shoal River:

> No agricultural implements have been forwarded to Shoal River, and as these bands, as before stated, manifest a great desire to cultivate the soil, every encouragement and assistance should be given them, and to this end we would recommend that arrange-

---

[65] W.M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[66] W.V. Lowry, Assistant Regional Director, Lands, Membership and Estates, Indian and Eskimo Affairs, to R.W. Winstone, Chief, Crown Lands, Department of Renewable Resources and Transportation Services, Winnipeg, Manitoba, June 17, 1977 (ICC Documents, p. 642).

[67] Surrender Instrument and related documents, June 2, 1924 (ICC Documents, pp. 546–51); Orders in Council, PC 1364, June 14, 1930 (ICC Documents, pp. 567–71).

[68] Orders in Council, PC 1364, June 14, 1930 (ICC Documents, pp. 567–71). Physically, members of the Shoal River Band were located in two separate communities, about 70 miles apart. Discussions proposing a division of the Band "to improve band administration and in order to have a council more attuned to the local needs and desires of the individual communities" began about 1977. In 1982, the Minister of Indian Affairs approved the division assented to in a plebiscite by a majority of the two groups. Two bands were created, Shoal River and Indian Birch. The reserves were divided between them: Shoal River Band received IR 65A, B, and F; and the Indian Birch Band received Swan Lake Reserve 65C.

[69] W. Christie and M.G. Dickason, Treaty Commissioners, to the Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 7–21).

> ments be made to forward the agricultural implements and carpenters tools as well as seed grain and potatoes as early as possible next spring ....[70]

The location of the original reserve held by The Key Band did not lend itself to successful agriculture, despite the Band's "desire to cultivate the land." The location of this reserve was described as "poor farming country" by Indian Agent A. McKay,[71] and the quality of the land was one of the determining factors that persuaded a portion of the original Band to relocate to the Fort Pelly district in 1882. On establishing themselves on their new reserve near Fort Pelly, the members of The Key Band set about constructing the infrastructure of their new community. Houses were erected by the summer of 1883, and plans soon followed for the construction of a day school and church.[72] The Band's attempts at farming, although slow, were also encouraging. For example, in 1883 the agent at Birtle noted that the Band had "done fairly well, have neat houses and small fields, but being totally ignorant of farming and unable to plow, advance slowly." In order to assist them, he "engaged a competent half-breed to instruct them in plowing for two months" and "lent this band cattle." In his opinion, the Band "appear[ed] anxious to improve."[73] Indeed, by the following summer some improvement had been noted. In 1884, T.W. Wadsworth, the Inspector of Indian Agencies, submitted the following report with regard to his inspection of IR 65:

> These Indians are doing very well, having this year fifty acres in crop, twenty of wheat, twelve of potatoes, sixteen of barley and two acres of garden, as against fourteen acres all told in 1883, and their cattle have increased from thirty-nine head, in 1883, to forty-seven head this year, with more calves to come. The chief asks to use his oxen in freighting when they are not required for farming. ... They asked for a mower, fanning mills, sickles, milk pans, two churns, six breaking ploughs, two iron harrows and two wagons. The chief wants two iron-bound carts in lieu of a light wagon, and two sets [of] pony plough harness [sic] for the use of the band; he also asked for clothing. At each house can be seen a saw pit, the Indians having whip saws of their own.[74]

---

[70] W. Christie and M.G. Dickason, Treaty Commissioners, to the Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 7–21).

[71] A. McKay, Indian Agent, to SGIA, October 11, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 47–52).

[72] See Rev. Harry B. Miller, *These Too Were Pioneers: The Story of the Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1994* (Melville, Sask.: Seniors Consulting Service, 1984), 24–25 (ICC Exhibit 6), and T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 93 (ICC Documents, p. 137).

[73] Canada, Parliament, *Sessional Papers*, 1884, No. 4, 63, as quoted in Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1994* (Melville: Sask.: Seniors Consulting Service, 1984), 24 (ICC, Exhibit 6).

[74] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, September 17, 1884, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 93 (ICC Documents, p. 137).

The Band's initial progress in agriculture, however, began to decline towards the end of the decade, after the department removed the full-time farming instructor from the Pelly district. According to Indian Commissioner Hayter Reed's 1888 inspection report of all three reserves in the Fort Pelly district (The Key, Keeseekoose, and Cote), the crops raised by the Bands were "of small value, and they have been deprived of the benefit of the vegetables, which I observed had, in the absence of White supervision, been allowed to be choked out by weeds."[75] The Band's lack of progress was compounded, according to Reed, by a serious local decline in small game and fur-bearing animals. As a result, he sent W.E. Jones, one of his subordinates employed at the Touchwood Hills Agency, to spend "a month or so on the spot and make such investigations as will enable us to reach a just conclusion as to the actually existing condition of things, and the prospects." Reed stated that, although it was apparent that some action was required to remedy the above situation, he would await Jones's report before initiating any administrative changes.[76]

On October 7, 1888, W.E. Jones arrived in Fort Pelly and conducted a house-by-house inspection of the three reserves located there. His extensive observations concerning The Key Band at Fort Pelly reveal the degree of decline in the community:

> I visited the Keys reserve here, this Band is considerably divided up, only a part of them residing on their reserve, these have done but little in the shape of farming, and I am sorry to say what crop they had was frozen, many of these people are far from being healthy, being afflicted with scrofula. ...
>
> These people come from the Shoal River, where fish was plentiful. They have had no chance to learn anything of the usage of implements for farming: in my opinion it was a great mistake that these Indians were removed from Shoal River and placed on their present reserve. I am sure you were not advised fully in the matter.
>
> Their argument is this, you (the Department) asked us to go to Fort Pelly on a reserve there, and you would help us. We have done so, we knew nothing of farming, and you sent no one to help us. We did the best we could ourselves and it has failed, we have nothing and we want you to help us by giving work to those who can work, and relief to others.
>
> The other part of the Keys band are all Swampy Crees, and are living at the north mouth of Shoal River. They were born and brought up there. I visited these Indians, a distance of 90 miles. They are totally ignorant of any other means of earning a living,

---

[75] Hayter Reed, Indian Commissioner, to Edgar Dewdney, SGIA, September 6, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, pp. 149–56).

[76] Hayter Reed, Indian Commissioner, to Edgar Dewdney, SGIA, September 6, 1888, NA, RG 10, vol. 3805, file 51162 (ICC Documents, pp. 149–56).

> except by fishing and hunting: their chief food is fish, this they think they must have. When it was suggested to Chief Key and his band that they remove to Fort Pelly, these Indians some 19 families, the majority of the Band said they would not go, for the reasons that they were better off where they were, and warned the Chief not to take up land on their account. On their not going up to the Reserve, all their cattle and implements were taken from them. A year after John Beardy, H.M. [Headman] began a correspondence with the Supt. General as to their troubles. This continued through 1884 & 5 when they were told to take the correspondence and go to Regina.
>
> These people have not received any relief from the Department. They have done for themselves, and have quite a number of cattle, if they had been removed here, they would have had to have been fed, or else return to where they are; in my opinion they have shown good sense in their actions, also save the Dept. a lot of money and trouble. I would recommend that they be allowed to remain where they are for some time yet until we have more land prepared on their Reserve, and are sure we can raise crops there. They want secured a small portion of land for a fishing station, at the north mouth of Shoal River.
>
> This could be a fishing station for all Fort Pelly Indians in the future. ...
>
> On Cotes Reserve a large quantity of hay can be cut possibly 6 or 700 tons, and about 4 or 500 tons on Kee-see-koose, but little can be got on the Keys, so if cattle can be provided for these people, and if it is closely attended to, hay can be secured for them. Oxen will be required for next springs work.[77]

As a result of the above inspection, the department authorized Jones to continue on in the Pelly district on an experimental basis until it could be determined whether his presence there had a beneficial effect on the progress of the three Bands.[78] In the spring of 1889, he submitted his first report as acting agent. He reported that the Bands had "done a lot of work during the winter, hauling in their hay from where it was cut, getting out rails and logs, also some of them sawing quite a lot of lumber," but that the hunters "had a miserable catch" and would not be able to reduce the debts they had contracted in the fall. Therefore, Jones recommended "a further provision for these Indians here, to carry them through the fiscal year."[79] His Annual Report submitted later the same year was marginally more encouraging. While progress in the area of gardening had enabled the bands to support themselves reasonably well during the summer months, the hunt had been poor and many of the animals they usually hunted had disappeared.[80] In general, the Bands did not yet appear to have recovered from earlier setbacks and were making slow progress in the transition to full-time farming.

---

[77] W.E. Jones to Hayter Reed, Indian Commissioner, November 3, 1888 (ICC Documents, pp. 158–60).

[78] Hayter Reed, Indian Commissioner, to DSGIA, June 12, 1890 (ICC Documents, p. 225).

[79] W.E. Jones, Acting Indian Agent, to Hayter Reed, Indian Commissioner, April 20, 1889 (ICC Documents, pp. 176–78).

[80] W.E. Jones, Acting Indian Agent, to SGIA, August 29, 1889, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1889*, 63 (ICC Exhibit 7, vol. 3).

Concerned that the Pelly Agency Bands would lose interest in the pursuit of farming and stock raising, Assistant Indian Commissioner A.E. Forget recommended that a communal hay reserve be established for the exclusive use of the three Pelly Bands, The Key, Cote, and Keeseekoose. After being approved by senior officials within the Department of Indian Affairs, the request was forwarded to the Department of the Interior for approval, and confirmation was received in May 1890. Approximately 20.5 square miles of land were thereby established as a hay reserve for the Indians of the Pelly Agency.[81]

It appears that, after 1889, all three Bands in the Pelly Agency made notable progress towards the department's goal of promoting community self-sufficiency.[82] By the summer of 1890, despite having suffered through a few poor seasons during the 1880s, the members of The Key Band had established a reputation with Inspector Wadsworth as intelligent, self-sufficient people. After Wadsworth inspected the reserve during the summer of 1890, he was cautiously optimistic:

> Key Reserve. The Chief of this Band came from Shoal River, Lake Winnipegosis several years ago, bringing with him only a portion of his Band, they now number sixty eight souls, eleven heads of families. Those still remaining at Shoal River number one hundred and fifty-souls.
>
> This Chief, together with his two brothers, are hunters and beyond growing a few potatoes, give but little attention to farming. However, up to the present time, they have lived comfortably and required but little assistance from the Agent. The other families were originally boat builders and voyageurs; they are intelligent, handy men, and take great interest in farming and cattle raising. They have comfortable houses, good stables, corrals, stock yards, root houses, milk houses etc. Their acreage in crops this year was not large (25). Their potatoes, onions and turnips are a magnificent crop but their grain is a failure on account of the frost. The land of the Reserve where they have settled is light sandy soil, but with Fall plowing, early sowing and copious spring rains, should produce good crops.

---

[81] For further information about the creation and extinguishment of the "Pelly Haylands" reserve, see A.W. Ponton, DLS, to the Secretary, DIA, December 28, 1898 (ICC Documents, pp. 295–97); Order in Council dated March 15, 1899 (ICC Documents, p. 298); F. Pedley, DSGIA, to P.G. Keyes, Secretary, Department of the Interior, February 21, 1903 (ICC Documents, p. 350); F. Pedley, DSGIA, to H.A. Carruthers, Indian Agent, October 22, 1903 (ICC Documents, p. 353); and D. Laird, Indian Commissioner, to F. Pedley, DSGIA, December 26, 1905 (ICC Exhibit 16).

[82] For a complete analysis of contemporary DIA policy with regard to Indian reserve farming and stock raising, see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1991).

> Cattle – They have seventy five head of cattle from sixteen cows they have this year reared fifteen calves. I saw most of the cattle, they are in excellent condition, the cows are milked and the calves fed. Butter is made. The calves are in enclosed fields with access to water.
>
> These people have considerable private farming property namely twelve horses, four cows, five young cattle, two mowers, two wagons, one cart, two bobsleighs, three buckboards. They work four [illegible] horses at farm work, they have also a good deal of poultry, apparently insignificant in value but they are an important addition to their resources, eggs being always saleable at good prices.[83]

Statistics compiled from the Annual Report for that year show that the Band also owned 13 oxen and 12 horses, together with 17 houses and 14 stables.[84] The figures listed in the Annual Report also reveal that the Band planted a total of 26 acres in various crops, with varying degrees of success. For instance, band member John Redlake planted 2.5 acres of wheat that was destroyed, likely by early frost.[85] The Band, however, had more success growing hardy crops such as oats, barley, potatoes, and turnips, and managed to harvest 88 bushels of oats on 6 acres, 90 bushels of barley on 8.5 acres, 267 bushels of potatoes on 4.5 acres, and 193 bushels of turnips on 4 acres.[86]

From these statistics, it can be determined that each male head of family, even those categorized as "hunters," made an effort to put some crop in the ground. The degree of success attained by the various members varied a great deal. On the whole, however, it is not surprising that Wadsworth would have concluded that "they have lived comfortably and required but little assistance from the Agent." Together, the Inspector's report and statistics depict a group that had sustained a measurable degree of success in their effort towards adaptation of an agricultural lifestyle.

The situation was much the same in 1895, the last year in which the Department of Indian Affairs collected and published crop production statistics for individual bands.[87] A review of those statistics reveals that The Key Band members had maintained similar production levels to those attained in 1890, with the exception of decreases in wheat and turnip yields. In all other measured categories, the Band had increased its crop production from the levels reported in 1890. For example, 250 bushels of oats were produced from 12.5 acres, 155 bushels of barley were produced from 7.75 acres, and 460 bushels of potatoes were harvested from 5.75 acres.[88] Furthermore, the Band increased the number of acres planted within its communal garden. Finally, the statistics show that 770 tons of hay were harvested from the various hay swamps on the reserve.[89] Wadsworth's inspection report for the year in question adds further detail:

---

[83] T.P. Wadsworth, Inspector of Indian Agencies, to SGIA, October 6, 1890, NA, RG 10, vol. 5844, file 73400 (ICC Documents, pp. 228–37).

[84] See "Approximate Return of Grain and Roots Sown and Harvested, Fort Pelly," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 258–59 (ICC Exhibit 7, vol. 3).

[85] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1890," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 270–71(ICC Exhibit 7, vol. 3).

[86] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1890," in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1890*, 270–71(ICC Exhibit 7, vol. 3).

> Key Band: Six Indians of this band are farmers, namely; William Brass, George Brass, Thomas Brass, John Redlake, William Brass, Jr., Chief Key and his two brothers. Very few, if any, of the halfbreeds of this country have as good home surroundings as the first five men named. Their houses are excellent buildings, are partitioned and have also sleeping apartments upstairs.
>
> The farmers of this band occupy eleven houses and fifteen stables. They have ten work oxen, one hundred and eighteen cows and young cattle, twenty-two horses, seventy fowls, five farm wagons, two mowers, two horse rakes and have already ten acres in grain sown.
>
> Wm. Brass, Sr's. family are great butter makers and raise turkeys as well as other poultry. This band has also the use, on loan, in addition to the above mentioned private property, of two mowers, two horse rakes and two farm wagons. For Indians they have not many horses, but those they have are of superior breed.
>
> The large portion of this band who live at Shoal Lake are reported as a very good lot of Indians. They number nearly one hundred and sixty souls. Last year they raised sufficient potatoes for use and seed, and one man this spring had eighty bushels to sell. Their principal subsistence is from fishing and hunting.

Reporting on the entire agency, Wadsworth continued:

> Live Stock: I rounded up the cattle at the different Indian farms, and I assured myself of the reasonable correctness of the live stock registers, from which the quarterly returns are made up.

---

[87] After 1895, the Annual Reports of the Department of Indian Affairs produced statistics only at the agency level. Because these figures included all bands in a given agency, they do not, unfortunately, lend themselves easily to the assessment of individual bands.

[88] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1895," in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 430 (ICC Exhibit 7, vol. 3).

[89] See "Return Showing Crops Sown and Harvested by Individual Indians in Pelly Agency, Season of 1895," in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 430 (ICC Exhibit 7, vol. 3).

> The animals are in good condition, better than I have ever seen them so early in the spring in this part of the country.
>
> There are already a good number of spring calves. The spring being so favourable, I thought it a pity there were not more. At every farm there was hay on hand and to spare. The stables were in good repair, and there were a few young bulls which had not been castrated last fall, but while I was there the oversight was being rectified ...
>
> I feel warranted in stating that every stable is fitted with stanchions and that every animal is legibly branded "ID." I say this from the fact that of all the stables I entered, I found them fitted up as stated, and I do not recall observing one animal without the brand. I attribute this favourable state of affairs to the indefatigable persistence of the agent, who never allows an Indian to rest in peace until a thing is done that has to be done; and as they are becoming forehanded in their work, they appear to be satisfied and contented with their situation....[90]

Taken together, the Inspector's report and statistics reveal that the Band was increasing its efforts to raise crops in 1895. It is more difficult, however, to quantify the Band's success in stock raising that year, given that both Wadsworth and, in the following report, Agent Jones limited their comments to the significant increase in the agency as a whole:

> The earnings of the Indians have increased over those of last year, and the Indians have the will to do more if they had the opportunity, but all such resources as the selling of hay or wood (a small quantity has been sold to the school) is cut off, as we are fifty miles from the towns and settlements. ...
>
> Their stock consists of one hundred and forty-three horses, thirteen bulls, one hundred and sixteen oxen, two hundred and ninety-five cows, one hundred and thirty-three steers, one hundred and fifteen heifers, one hundred and fifty-seven calves (up to 30th June), one hundred and forty-six sheep and lambs; total cattle, eight hundred and twenty-nine, also the sheep and horses above mentioned. This is the showing now of the property of the Indians here (one hundred and sixty head has been consumed, sold and died), as compared to two hundred and eighty head owned by them in the year 1889, an increase in a period of six years of seven hundred and ten head. The increase in value over last year of live stock held by Indians will amount to about $4,725.[91]

Nevertheless, Jones did confirm that some members of The Key Band shared in this success. With respect to William Brass Sr and family, Jones stated:

---

[90] See *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 115–22 (ICC Exhibit 7, vol. 3).

[91] W.E. Jones, Indian Agent, Cote, Assiniboia, to SGIA, August 5, 1895, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 102–05 (ICC Exhibit 7, vol. 3).

> William Brass, sr., in 1889 had five head of cattle; he now owns thirty-five head of cattle, six horses, two double wagons, mower and rake. Last year he sold and consumed six head of cattle. This Indian has a good house, always clean, a dairy house; his daughter, Susan, milking six cows, making butter and selling it to the traders at Fort Pelly. They keep about thirty fowls and raise a number of turkeys every year.[92]

Jones also stated that John Redlake, George Brass, and Thomas Brass were "proportionately well off" in comparison with William Brass and other successful examples from the entire agency. In general, therefore, the department's Annual Report for 1895 suggests that the members of The Key Band were also sustaining their progress in stock raising.

Although statistical evidence for the years after 1896 is sparse, documentary evidence indicates that the Band maintained a slow but steady increase in agricultural production. In 1898, Inspector Alexander McGibbon reported that the Band had 22 acres under crop and had broken five additional acres of garden.[93] The same report stated that band members had 212 head of cattle, 25 horses, and nine sheep.[94] While the total acreage in crop during this year was marginally lower than had been the case during the previous decade, the figures for livestock and garden production reflect an increase and reveal that the Band was expanding in new directions such as sheep raising.

This pattern continued into the next century during the years immediately preceding the surrender. In 1903, for example, L.J.A. Leveque, the Inspector of Indian Agencies, submitted the following report regarding the Band's performance:

> Resources and Occupations.– The majority of this band make their living by hunting and freighting; only a few follow husbandry or cattle-raising for a living.
> Cattle.– All the stock inspected, numbering one hundred and twenty-one head. The property of seventeen individuals, were found in fairly good condition; an abundance of hay was left over. Part of this band had been transferred to the Lake Manitoba inspectorate and took ninety-four head of cattle with them.
> Crops. – There were about sixty acres of land under crop, which is a slight increase over last year.[95]

---

[92] W.E. Jones, Indian Agent, Cote, Assiniboia, to SGIA, August 5, 1895, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1895*, 103 (ICC Exhibit 7, vol. 3).

[93] Alexander McGibbon, Inspector of Indian Agencies, to SGIA, September 27, 1898, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1898*, 193–94 (ICC Exhibit 7, vol. 3).

[94] Alexander McGibbon, Inspector of Indian Agencies, to SGIA, September 27, 1898, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1898*, 193–94 (ICC Exhibit 7, vol. 3).

[95] L.J.A. Leveque, Inspector of Indian Agencies, to SGIA, September 8, 1903, Department of Indian Affairs, "Annual Report for the Year 1903," pp. 228–30 (ICC Exhibit 7, vol. 4).

It is interesting to note that, despite Leveque's assertion that only a few members of the Band farmed or raised stock for a living, their stock statistics remained more or less constant from previous years.[96] The acres under crop had increased to 60 – the highest number on record to that date and more than double the average acreage cropped during the 1890s. The historical record also reveals that, in 1903, the Band expressed a clear interest in expanding its mixed-farming production and asked the department to provide moneys to assist the establishment of younger band members in the direction of commercial crop production. This initiative led to a series of meetings between the Band and departmental representatives, resulting in a surrender proposal that would have provided better land and some capital for band members to acquire the implements required to increase production and to assist young men who wished to make a start in agriculture.[97] As we will see, nothing resulted from these discussions, but it appears that the older men within the Band – including Chief The Key – believed that the initiative was in the best interests of the Band, as it would enable the Band as a whole to enjoy further progress.[98]

The evidence in this inquiry indicates that the Band continued to increase its agricultural activities in the years immediately preceding the 1909 surrender. In 1905, Agent H.A. Carruthers reported:

> These people are practically making a living without any help in the way of food from the Department, chiefly by the proceeds of cattle, hunting, freighting and selling hay and wood. A good start was made in farming by three young men this summer ... whom I assisted with oxen, the three of them breaking eighty-five acres of new land ...[99]

The Annual Report for the following year indicates that the three young men referred to by Carruthers had seeded the 85 acres broken by them the previous year and that, on their own initiative, they were breaking new land.[100]

In the spring of 1908, Agent W.G. Blewett advised his superiors that "gradually each year this band is purchasing the necessary implements and machinery for more farming."[101] In March 1909, he reported that the Band had "almost all the necessary implements and are buying all needed from their own resources."[102]

---

[96] The statistics referred to take into account the separation of the Shoal River faction in 1902.

[97] See H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 358-61).

[98] H.A. Carruthers, Indian Agent, Pelly Agency, to David Laird, Indian Commissioner, March 11, 1904, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 369–70).

[99] H.A. Carruthers, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, August 25, 1905, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1905* (ICC Documents, p. 408).

[100] H.A. Carruthers, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, July 4, 1906, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1906* (ICC Documents, p. 431).

From an early date, therefore, it appears that the Band displayed an interest in developing a farming and stock-raising economy. Despite some early setbacks, which departmental officials attributed to the absence of a farming instructor, the Band sustained or increased its agricultural efforts up until the date of surrender.

Proposed Surrender for Exchange, 1903–06

Increased settlement in the Fort Pelly district brought repercussions for The Key, Keeseekoose, and Cote Bands as early as 1898. As noted previously, an area of approximately 20 square miles had been reserved for Pelly Agency Bands in 1893 to provide additional haylands for the Bands' burgeoning stock-raising enterprises. In 1898, however, the Department of the Interior informed Indian Affairs that a portion of these reserved haylands would be required for a proposed settlement of Doukhobors.

By Order in Council dated May 15, 1899, approximately half of the Pelly haylands – "all of Fractioned Township 31, lying West of Kee-see-koose's Indian Reserve" – was removed from the administration of the Department of Indian Affairs and placed at the disposal of the Department of the Interior for redistribution as a communal reserve for Doukhobor settlers.[103] This decision would eventually have an impact on all three Bands in the Pelly Agency.

The department considered it imperative that the Pelly Agency Bands make full use of the remaining communal hay reserve, comprising approximately 6,000 acres[104] within fractional Township 30 and located directly west of Cote IR 64. In 1902, Alexander McGibbon, the Inspector of Indian Agencies, resurrected a plan originally proposed by Agent Jones ten years previously, whereby less valuable lands on The Key, Keeseekoose, and Cote reserves would be surrendered in exchange for productive lands located within what remained of the Pelly haylands reserve.[105] The proposal gained momentum in

---

[101] W.G. Blewett, Indian Agent, Pelly Agency, to Frank Pedley, DSGIA, April 2, 1908, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908* (ICC Documents, p. 447).

[102] W.G. Blewett, Indian Agent, Pelly Agency, to Department of Indian Affairs, March 3, 1909, *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1909* (ICC Documents, p. 468).

[103] Order in Council dated May 15, 1899 (ICC Documents, p. 298).

[104] On the issue of acreage, see D. Laird, Indian Commissioner, to Frank Pedley, December 26, 1905 (ICC Exhibit 16).

[105] See W.E. Jones, Indian Agent, to DIA, March 22, 1892 (ICC Documents, p. 261), and extract of report: Alex. McGibbon, Inspector of Indian Agencies, to DIA, June 24, 1902 (ICC Documents, p. 315).

August 1902 when departmental Secretary J.D. McLean voiced his approval of the scheme insofar as it concerned the Cote Band:

> The Department notes what you say ... as to the necessity for holding the Hay lands adjacent to Coté's Reserve pending further consideration by the Indians of the question of endeavouring to secure them permanently by the surrender of a portion of their Reserve.[106]

By October, the proposal was expanded to address the requirements of the Keeseekoose Band as well. Subsequently, a flurry of correspondence ensued in an attempt to identify the lands sought by the Cote and Keeseekoose Bands, to designate which lands would be made available for a surrender in exchange, and to determine whether the Department of the Interior would agree to an exchange when it was proposed.[107]

In the meantime, H.A. Carruthers had assumed the position of agent for the Pelly Agency and had taken an interest in the exchange initiative. In June 1903, Carruthers indicated that he would soon submit "a somewhat different proposal with a view to securing the desired hay land."[108] His proposal included The Key Band in the surrender-for-exchange initiative. In the fall of 1903, Carruthers discussed the issue with the Assistant Indian Commissioner, J.A.J. McKenna, who provided the following detailed instructions:

> Referring to the discussion we had in regard to the proposal that those Indians of Key's Reserve who are desirous of starting farming should have secured for them Township 30, Range 32, and the two South rows of sections in Township 31, Range 32, W.P.M., which subject is referred to in the letter of the Department to you of the 22nd ultimo, a copy of which you kindly transmitted to me, I beg to remind you of the application of Cote's band for a portion of said Township 30, in lieu of which they were prepared to surrender a portion of Section 31 included in their reserve. You will remember that Chief Cote brought this question up, and that I told him it was delayed pending decision as to the disposal of the whole of Township 30. I have since learned that there was a proposal by Agent McKenzie on behalf of Kisikouse's band for an exchange of part of their reserve for a portion of Township 31. You were to have a further meeting with Key's band to ascertain definitely their mind as to the proposed

---

106 Extract of a letter from J.D. McLean, Secretary, DIA, August 16, 1902, NA, RG 10, vol. 7770, file 27117-1, pt 2 (ICC Documents, p. 337).

107 See, for example, D. Laird, Indian Commissioner, to Indian Agent, Pelly Agency, January 17, 1903 (ICC Documents, p. 347); R.S. McKenzie, Indian Agent, to D. Laird, February 3, 1903 (ICC Documents, p. 348); D. Laird, Indian Commissioner, to Secretary, DIA, February 13, 1903 (ICC Documents, p. 349); F. Pedley, DSGIA, to P.G. Keyes, Secretary, Department of the Interior, February 21, 1903 (ICC Documents, p. 350); and J.D. McLean, Secretary, DIA, to P.G. Keyes, Secretary, Department of the Interior, March 18, 1903 (ICC Documents, p. 351).

108 Assistant Indian Commissioner to J.D. McLean, Secretary, DIA, June 16, 1903, NA, RG 10, vol. 3501, file 82, pt 1 (ICC Documents, p. 352).

> exchange, and to report the result. I think it well to deal with all proposed exchanges of land in your agency together, and any necessary surrenders prepared and forwarded together. I therefore decided to delay reporting to the Department as to the exchange desired by Cote until you have had a further conference with Key's band. It would be well then for you to transmit to me a full report respecting the proposed exchanges, describing as accurately as possible the lands affected.[109]

Acting on the instructions provided by McKenna, Carruthers arranged a meeting with The Key Band to further discuss the surrender proposal. The terms of the proposal were laid out in detail on this occasion. Although the events of this meeting were ultimately of no consequence, since Carruthers was merely polling band members to assess their support for the proposal, the following excerpts from his report are illuminating:

> I have the honour to acknowledge the receipt of your letter of the 9th. November last; relative to certain lands for Key's reserve, in Township 30, Range 32, West 1st. P.M. I have since learned from the Department of the Interior that all lands in Tp. 31, Rge 32, belong to the Doukhobors.
>
> I now beg to inform you that I spent the afternoon of the 14th. instant in the school house on Key's reserve, with the Indians of that band, who had a month's notice of the day of the meeting, and talked over at length, as to the wish and advisability of Key's band requesting that they be allowed to exchange an equal number of acres, lying to the West side of Stony Creek, as shown on attached plan, which runs through this reserve, for an equal number of acres, being all the land, lying between the Assiniboine and White Sand rivers, in Township 30, Range 32, W. 1 P.M. Also, as to this Band selling eight square-miles, more or less, as shown on attached plan, from the East side of their reserve, in order that those who wish to farm, on their new land between the two rivers, may be fitted out in horses and machinery to enable them to do so, after which, the cattle raisers to be given mowers, rakes and wagons, and the old people clothing &c. as may be arranged later, the Band a threshing machine, the balance to be funded by the Department to fit out other members of the Band who may want to start farming later.
>
> After a long talk a vote was taken, each male member of the Band, of the full age of twenty-one years being allowed to vote. I enclose you herewith the original voting list, by which you will see that the proposals were carried by a majority; only the Indians voted against it, the Treaty Halfbreeds and workers all voted for it. ...
>
> The Band would like to know, if the Department could not outfit some of the young men this Spring, and recoup itself when the land is sold, as otherwise over a year would be lost before land would be surveyed, sold and they outfitted.[110]

---

[109] J.A.J. McKenna, Assistant Indian Commissioner, to H.A. Carruthers, November 9, 1903 (ICC Documents, pp. 355–56).

[110] H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 358–61). As we have seen, under the provisions of Treaty 4, the Band had been provided with a one-time issuance of agricultural implements: "[T]he following articles shall be supplied to any band

A handwritten voters' list submitted with the Carruthers report indicated that nine of the 14 eligible male band members listed voted in support of the proposal. The vote was formally witnessed by the Reverend Owen Owens, the resident Church of England missionary, among others.[111]

Since Assistant Commissioner McKenna had already expressed concern about the previously tendered application of the Cote Band to execute a similar surrender for exchange, Carruthers stated that he was more inclined to exchange the majority of the coveted haylands with The Key Band because Chief Cote's Band already had "a splendid reserve and a fair quantity of hay." As the Cote Band had "a prior claim on the hay lands in question," however, Carruthers suggested that it be provided with "a strip, say three miles, more or less, long, on the west side of the Assiniboine River, by a half mile, more or less, wide, from the West edge of said river; they to forfeit an equal number of acres in the N.E. corner of their reserve."[112] In this manner, the immediate needs of both bands would be accommodated.

In February 1904, McKenna forwarded Carruthers a number of questions concerning the issue of surrenders for exchange in his agency and requested further information about the informal meeting held with The Key Band the previous December. McKenna noted that any arrangement made with The Key Band about the Pelly haylands exchange would also have to satisfy the Cote and Keeseekoose Bands, since the lands were held by all three.[113] The detailed reply returned by Carruthers outlined The Key Band's reasons for supporting the proposal. Carruthers wrote that all five men who voted against the proposal were closely related to the Chief, either by blood or by mar-

---

thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family so actually cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid ... " It is reasonable to presume that, by 1903, the "one plough and two harrows" provided to the Band under treaty would have been worn out and in need of repair or replacement. To do so, the Band required access to capital. Furthermore, the treaty did not provide for implements such as seed drills, hay mowers, gang ploughs, disc harrows, or threshing machines – mechanized implements that were essential to the profitable operation of a mixed-farming enterprise. Despite Agent W.G. Blewett's comments in 1908 and 1909 that the Band had been purchasing the implements it required, the 1903 and 1908–09 surrender discussions appear to show that the Band required additional capital investment in order to build on the progress it had made in mixed farming to that date.

[111] Those voting for the surrender included George Brass, headman; Peter O'Soup; Thomas Brass; Wm. Brass Jr; Alex. Brass Jr; Jos. Brass; Wm. Brass, headman; Chs. Thomas; and Solomon Brass. Those voting against included Chief The Key; Song way way kejick; Ka mo pi mi nin; Inche cappo; and Pay pay quosh. The signature of each band member was recorded with an "X" representing his "mark," with the exception of Peter O'Soup, Peter Brass Jr, and Charles Thomas, who signed on their own behalf. See "Vote taken at Key's Reserve this 14th day of December 1903" (contained in ICC Exhibit 16).

[112] H.A. Carruthers, Indian Agent, to the Indian Commissioner, December 21, 1903, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 358–61).

[113] J.A.J. McKenna, Assistant Indian Commissioner, to H.A. Carruthers, Indian Agent, February 18, 1904, NA, RG 10, vol. 3561, file 82-1 (ICC Documents, pp. 365–68).

riage. He noted, however, that he had recently discussed the situation with the Chief, who "openly acknowledges that he considered the plan was for the good of the Band," and would sign the surrender if submitted, but on the condition that the Band would never again be asked to cede its lands. Carruthers reported that, in his opinion, the Chief's initial refusal to consent was due to the belief that the surrender "was the thin edge of the wedge, and that his whole Reserve would ultimately be taken from him."[114] In conclusion, Carruthers emphasized the need to obtain adequate farming land for the future generations of The Key Band:

> The whole question resolves itself into this. If this piece of land is not obtained for Key's people, before it is withdrawn, as Township 31 was, what is to become of the young men in the future? Are they to go on for generations, eking out a precarious existence as they do now, depending on the few cattle they raise and what freighting and work they can get and the sale of a little wood and hay? It is the last chance to get a piece of land for them, as all other lands have been taken up.[115]

With the receipt of Carruthers's second report, McKenna forwarded the issue and all related documentation to Ottawa for resolution.[116] At this stage, the initiative slowed to a halt. For reasons that are not important to the present inquiry, a definitive response from the Department of the Interior was delayed for a period of many months, despite regular inquiries from Indian Affairs.

On December 13, 1905, the Department of Indian Affairs took matters into its own hands by obtaining a surrender for exchange involving 20,000 acres within Cote IR 64.[117] The Department of the Interior was then informed that no further action would be required on its behalf because the Minister of the Interior had already approved the Cote surrender for exchange with lands in the Pelly haylands. It subsequently became clear, however, that the remaining haylands jointly held by the three Pelly Agency Bands were the desired "exchange" area identified in the surrender agreement executed by the Cote Band. The new arrangement would consume all the available land, with nothing remaining for The Key Band. Asked to report on the advisability of this plan, departmental Surveyor Samuel Bray replied that it was still "possible to arrive at some understanding" with The Key Band without favouring one band over the other. He recommended that the issue be referred to Inspector W.M. Graham for a report.[118] Graham tendered his response on January 18, 1906. In his opinion, it was not necessary "to take any action effecting an exchange of land for Key's Band," since he concluded that "Key's Indians have sufficient land for their requirements."[119]

---

[114] H.A. Carruthers, Indian Agent, Pelly, to David Laird, Indian Commissioner, March 11, 1904 (ICC Documents, pp. 369–70).

[115] H.A. Carruthers, Indian Agent, Pelly, to David Laird, Indian Commissioner, March 11, 1904 (ICC Documents, pp. 369–70).

[116] J.A.J. McKenna, Assistant Indian Commissioner, to DSGIA, April 9, 1904, NA, RG 10, vol. 3562, file 82-1 (ICC Documents, pp. 373–76).

[117] D. Laird, Indian Commissioner, to Frank Pedley, DSGIA, December 26, 1905, NA, RG 10, vol. 3561, file 82-1 (ICC Exhibit 16).

Despite the fact that Carruthers had regularly called for a surrender for exchange that would benefit both The Key and the Cote Bands,[120] and despite the support of Chief Surveyor Samuel Bray, the department ultimately adopted Graham's recommendations and added the entire residual Pelly haylands to the Cote Reserve in exchange for a surrender of equal acreage from that reserve. The Key Band received no further benefit from the haylands, which had been reserved for the use of all three Pelly Agency Bands in 1890.

THE 1909 SURRENDER

The ascension of the Laurier government to power in 1896 ushered in a new era of immigration and western expansion in Canada. Under the direction of Clifford Sifton, Minister of the Interior from 1896 to 1905, the new government implemented an aggressive immigration policy aimed at attracting agrarian settlers from around the globe. Thousands of immigrants arrived in Canada to take advantage of the free dominion lands that the government was offering to willing homesteaders. Many of these immigrants joined migrants from the rest of Canada, where farm lands had become increasingly difficult to acquire. Together, these groups relocated within the vast, fertile stretches of western Canada, especially the southern portions of present-day Manitoba, Saskatchewan, and Alberta.[121] Since western expansion was one of the major concerns of the era, it is not entirely surprising that the second portfolio held by the Minister of the Interior – Superintendent General of Indian Affairs – received less attention. Under Sifton and his predecessors, "Indians were viewed always in the context of western development: their interests, while not ignored, only rarely commanded the full attention of the responsible minister."[122] This would change under Sifton's successor, Frank Oliver, who, from 1905 to 1911, took a more aggressive approach to Indian Affairs.

---

[118] Samuel Bray, Chief Surveyor, to DSGIA, January 12, 1906 (ICC Documents, p. 414).

[119] W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, January 18, 1906, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 439).

[120] See H.A. Carruthers, Indian Agent, to Indian Commissioner, December 21, 1903 (ICC Documents, pp. 358–63), March 11, 1904 (ICC Documents, pp. 369–72); and H.A. Carruthers, Indian Agent, to the Secretary, DIA, June 7, 1904 (ICC Documents, pp. 384–86), August 2, 1904 (ICC Documents, p. 396), and March 10, 1905 (ICC Documents, pp. 403–04).

[121] For an overview of dominion lands policy, see D.J. Hall, "Clifford Sifton: Immigration and Settlement Policy, 1896–1905," in Howard Palmer, ed., *The Settlement of the West* (Calgary: University of Calgary Press, 1977); Gerald Friesen, The *Canadian Prairies: A History* (Toronto: University of Toronto Press, 1987), 242–74; and Chester Martin, *'Dominion Lands' Policy* (Toronto: McClelland & Stewart, 1973).

Historian Sarah Carter has argued that the major preoccupation of Indian Affairs administrators during the Laurier era "was to induce Indians to surrender substantial portions of their reserves, a policy which ran counter to efforts to create a more stable agricultural economy on reserves."[123] Likewise, Professor Brian Titley has argued that the Laurier government – especially Oliver – followed a policy of "acceding to the demands of those who coveted Indian land."[124] Most bureaucrats of the day believed that the policy of having First Nations divest themselves of "unused" or "unnecessary" areas of their reserves was justified in the face of continued immigration to the western provinces. The following extract from the Deputy Superintendent General's Annual Report for 1908 is illustrative:

> So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves of any part of their reserves.
>
> Conditions, however, have changed and it is now recognised that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by doing so seriously impeding the growth of settlement, and there is such demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve pro tanto the country of the burden of their maintenance, it is in the best interests of all concerned to encourage such sales.[125]

According to Oliver, "the interests of the people must come first, and if it become a question between the Indians and the whites, the interests of the whites will have to be provided for."[126] It appears that this policy was implemented in an active way. On December 1, 1909, Oliver announced in the House of Commons that 725,517 acres of surrendered Indian lands had been sold by the Department of Indian Affairs between July 1, 1896, and March 31, 1909.[127]

---

[122] D.J. Hall, "Clifford Sifton and Canadian Indian Administration, 1896–1905," *Prairie Forum* 2, 2 (1977): 128.

[123] Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal and Kingston: McGill-Queen's University Press, 1991), 244.

[124] E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986), 21. The first amendment, passed in 1906, allowed for 50 per cent of the purchase price to be distributed to the First Nation at the time of sale. The former allowance had been 10 per cent. The increase acted as a powerful incentive for negotiating surrender because First Nations were short of accessible capital. The second amendment, passed in 1911, enabled the removal of Indians from any reserve that was located within or beside a town of 8,000 or more residents. See *The Historical Development of the Indian Act* (Ottawa: DIAND, 1978), 103–04, 108–09.

[125] Frank Pedley, DSGIA, to Frank Oliver, Minister of the Interior and Superintendent General of Indian Affairs, in *Annual Report of the Department of Indian Affairs for the Year Ended March 31, 1908*, xxxv (ICC Documents, p. 445).

[126] Canada, House of Commons, *Debates* (March 30, 1906), cols. 948–50.

One procedural tool developed by Oliver to assist in freeing up land for immigrant settlers was designed to give departmental officials greater latitude in offering cash advances during surrender negotiations. With the approval of the Minister, the surrender provisions of the ***Indian Act*** were amended to increase the permitted payment that could be made to bands on surrender, from the former ceiling of 10 per cent to a new maximum of 50 per cent of the total sale proceeds. The amendment also enabled the department to negotiate exactly how the increased amount could be provided to the band. As a result, the details of a surrender agreement could include expenditures for items such as agricultural provisions, fencing, or support for the elderly. These expenditures were to be included within the 50 per cent advance, thereby affording the department considerable flexibility in negotiating surrenders. When introducing the amendment in the House of Commons, Oliver outlined his intentions as follows:

> This Bill contains only one section and has only one object. It is simply to change the amount of the immediate and direct payment that may be made to Indians upon the surrender of their reserve. At the present time Indians on surrendering their lands are only entitled to receive ten per cent of the purchase price either in cash or other value. This we find, in practice, is very little inducement to them to deal for their lands and we find that there is a very considerable difficulty in securing their assent to any surrender .... It was brought to the attention of the House by several members, especially from the Northwest, that there was a great and pressing need of effort being made to secure the utilization of the large areas of land held by Indians in their reserves without these reserves being of any value to the Indians and being a detriment to the settlers and to the prosperity and progress of the surrounding country. Several suggestions were made with the view of facilitating the object which seemed to be generally acceptable to the House and it seemed to me, in considering the matter, that one step that might be taken would be to provide for increasing this first payment to the Indians from ten per cent to as high as fifty per cent according to the judgment of the government in the matter and according to the case ....[128]

---

127 Canada, House of Commons, ***Debates*** (December 1, 1909), col. 784.

128 Canada, House of Commons, ***Debates*** (June 15, 1906), 5421–22 (Frank Oliver, Superintendent General of Indian Affairs) (ICC Documents, p. 423).

Combined, the new policy and procedural directives developed by the department had an immediate effect on the quantity of Indian land surrendered on the prairies, where agricultural land was deemed to be in great demand.

In the spring of 1908, Dr E.L. Cash, the Member of Parliament for the MacKenzie constituency from 1904 to 1917,[129] asked the department about the possibility of a surrender of The Key Reserve. Dr Cash had once been the medical officer assigned to the Pelly Agency and had been on contract to the department to provide services to the Indians there. In addition to knowing the departmental administrators in that region, Cash would have been familiar with the Agency's reserves.[130] On receipt of Cash's inquiry, Deputy Superintendent General Frank Pedley responded that the department was not aware of any "correspondence intimating a desire on the part of the Indians or any action towards a surrender of the Keys reserve."[131]

Less than three months later, on July 24, 1908, Agent W.G. Blewett at Pelly reported to Inspector Graham that certain members of The Key Band had asked to sell 13 sections of their reserve to raise money to buy farm animals and implements:

> I beg to say that the members of Key Band have asked me to write you and request you to arrange with the Department for the Sale of part of their Reserve. They feel that they have too much land and not enough horses and implements to work satisfactorily, so desire to sell part of their Reserve. They wish you to arrange with the Department before you come to see them so that you can pay them at once when you come to take the surrender. The conditions are as follows: –
>
> 1st. To surrender a strip of land one mile wide off the West side of the Reserve, and a strip one and a half miles wide off the East side, in all 13 sections.
> 2nd. Only those at present taking Treaty at Keys Reserve to participate.
> 3rd. The first payment to be cash at the time of surrender and to be $80.00 per head.
> 4th. Any one [sic] losing house or improvements by the surrender to be recompensed for the same. ...
>
> Personally, I think it would be a good thing to sell part of their Reserve and buy outfits or those implements they are short of instead of getting Government assistance.

---

[129] See *Directory of Members of Parliament and Federal Elections for the North-West Territories and Saskatchewan, 1887–1966* (Regina: Saskatchewan Archives Board, 1967), 20.
[130] See R.S. McKenzie, Indian Agent, to SGIA, July 15, 1901, *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902*, 167–69 (ICC Documents, pp. 312–14).
[131] Frank Pedley, Deputy Superintendent General, to E.L. Cash, Member of Parliament, April 30, 1908 (ICC documents, p. 449).

> If you think this is a good plan I hope you can have it arranged so as to settle the deal this Fall.[132]

Graham forwarded Blewett's report to headquarters on August 13, 1908.[133] In his transmittal letter, Graham noted that, although "this Band have a lot of poor land on one Section of the Reserve which would be impossible to sell," they possessed a quantity of "very fine land on another Section of the Reserve." In his opinion, if a portion were to be surrendered and sold "there would be enough land left, in fact more than the Band can ever use." Before surrender negotiations could be initiated, however, Graham noted that he would require a decision as to whether the Shoal River Indians would be allowed to vote on the surrender proposal.[134]

The record submitted for the purpose of this inquiry does not yield further correspondence relating to The Key Band surrender until January 1909. On this occasion, Graham informed his superiors that he had met with an undisclosed number of The Key band members[135] to discuss the detailed terms under which the Band would consider surrendering land:

> ... I beg to say that I was on the Reserve on Monday last, the 18th inst., and met the Indians and discussed the matter with them. Instead of surrendering thirteen sections as they wished to do in the first place, I persuaded them to surrender seventeen sections [10,880 acres] as the Land in question is not being used and is very light and cut up with Sloughs, and scrub, and will not bring a high price. However, there is a time coming when the Land will sell.
>
> The Indians wanted $100.00 each down at the time of surrendering the thirteen sections first mentioned, but have agreed to accept this amount as a first payment on Seventeen Sections, should they surrender. I think this request is a reasonable one.
>
> The Indians would like to surrender this Land and receive a payment by April next, and I would be glad to know what the Department intend to do in the matter.
>
> When this Reserve was set aside some thirty years ago, I understand the Shoal River Indians were included in the allotment but as the Indians never resided on the Reserve from the beginning, the Key band do not consider them as shareholders in their Reserve. The Shoal River Indians are living on a small Reserve at Shoal River and are, I understand, quite contented to remain where they are, and on the other hand the Key Band are quite contented to relinquish any claim they may have to the Shoal River Reserve.

---

[132] W.G. Blewett, Indian Agent, Kamsack, to "Sir," July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[133] W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, Ottawa, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[134] W.M. Graham, Inspector of Indian Agencies, to Secretary, Department of Indian Affairs, Ottawa, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[135] It is possible that Graham arranged this meeting on instructions from Ottawa. The assembled record does not provide clarification.

> There are at present about 87 Indians on Keys Reserve, it would take therefore about $8700.00 to make the payment, and perhaps an extra thousand dollars to settle for any improvements that might be on the Surrendered Land. The total payment will be less than one dollar per acre.
>
> I am enclosing herewith an old map (the only one I have) showing the land it is proposed to surrender. I would be glad to have the map returned.[136]

The $100 cash payment at the time of surrender, as well as expenditures relating to agricultural supplies and assistance for the elderly, was to be paid from the capital generated by the sale of the surrendered lands.[137]

Chief Surveyor Bray reviewed the proposal thereafter and submitted his "Description for Surrender" on January 29:

> All those certain two tracts of land situated in the Key Indian Reserve No. 65, in the Province of Saskatchewan containing together an approximate area of 11,500 acres and described as follows:–
>
> First:– All that portion of the said Reserve lying East of the East limits of projected sections 4, 9, 16, 21, 2[?], and 33 in Township 32 Range One, West of the Second Meridian.
>
> Second:– All that portion of the said Reserve lying West of the West limits of projected Sections etc 11, 14, 23, 26, and 35 in Township 32, Range 2, West of the Second Meridian.
>
> Note – The above includes the whole tract. The area of land will prove to be considerably less as there are several small lakes to be excepted in the actual survey. – S.B.[138]

At 11,500 acres, Bray's calculation of the proposed area to be surrendered was approximately 620 acres more than the estimated area of 10,880 acres discussed at the pre-surrender meeting of January 18, 1909, and was 3,180 acres more than the Band had proposed be surrendered in 1908. The Deputy Superintendent General authorized the surrender as outlined on February 13, 1909.[139]

A number of months passed before Inspector Graham was able to schedule his journey to the Pelly Agency to take surrenders from The Key and

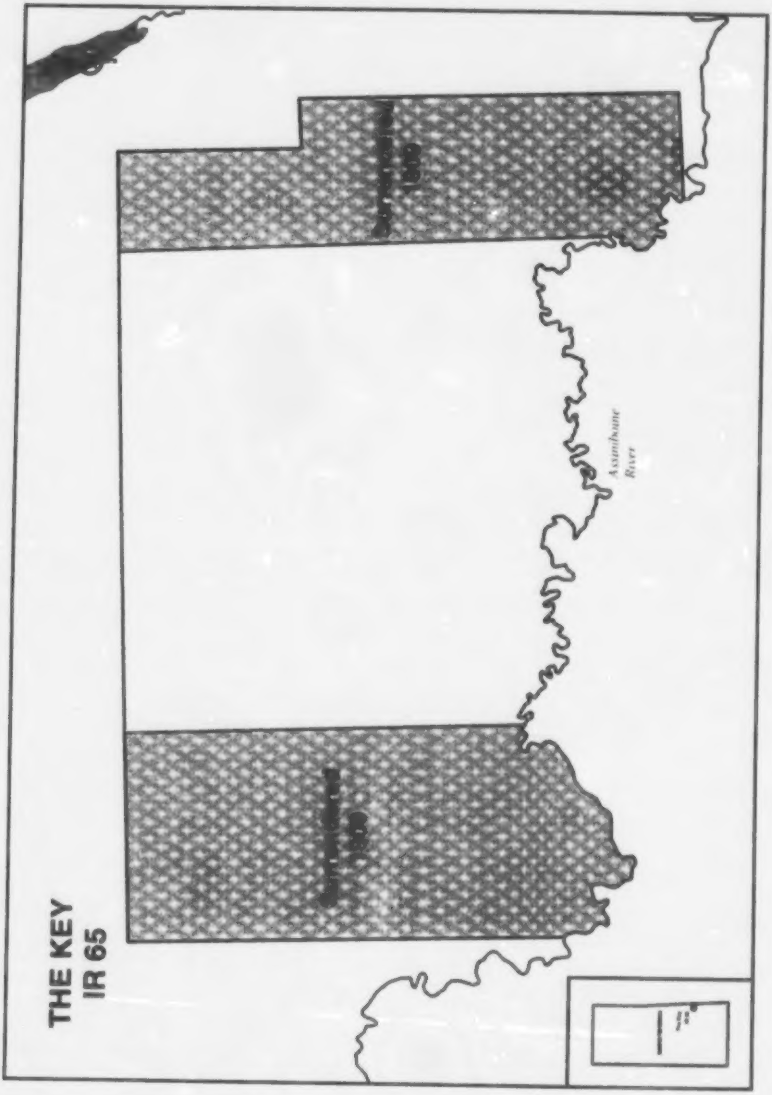
---

[136] W.M. Graham, Inspector of Indian Agencies, to Frank Pedley, Deputy Superintendent General, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 461).

[137] "Surrender of Land on Key's Reserve," May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–78).

[138] "Description for Surrender," S. Bray, Chief Surveyor, January 29, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 463).

[139] Frank Pedley, DSGIA, to W.M. Graham, Inspector of Indian Agencies, February 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 466).


THE KEY
IR 65
Assiniboine River

Keeseekoose Bands.[140] During this time, Agent Blewett wrote to the department to express concern on behalf of the bands about the delays:

> When Inspector Graham was here last January, the Indians of the Key's and Keeseekoonse [sic] Bands asked him to try to arrange for a surrender of part of the Reserves. They are very anxious to know if the Department has sanctioned this and if so, when they can expect to have the surrender taken. I would like to ask, that if a surrender is to be taken, that it be done, if convenient, before the breaking season starts (May 20th) so that the Indians may get oxen etc. to start farming early in the season.[141]

Graham arrived in the Agency on May 13 and conducted surrenders at the Keeseekoose Reserve on May 15 and at The Key Reserve on May 18. He outlined both these transactions in his report to the Deputy Superintendent on May 21, 1909:

> I have the honour to inform you that I arrived in this Agency on the 13th of this month and at once notified the Indians of Keeseekoose Band of a meeting to be held on Saturday, May 15th, 1909, for the purpose of discussing the matter of surrendering a part of their reserve. The meeting was held on that date, and nearly every member of the Band was present. A vote was taken and the Band were unanimous for surrendering. The papers were duly signed and I at once began to make the payment of $85. per head. There were 134 Indians present and the payment amounted to $11,390. There are still four Indians to pay, and I shall require $340. to pay them, as the amount sent to me was not large enough to complete the payment.
>
> With regard to improvements on the land surrendered, – I have made a careful valuation, which is as follows, and I would ask that a cheque be sent me just before I next visit this Agency, so that I can make settlement, – ...
>
> I held a meeting of Key's Band on the 18th of the month, and the Indians of this reserve also agreed to surrender approximately 11,500 acres. Nearly all the members of the Band were present and the vote was unanimous. I made a payment of $100.00 to each of the Indians.
>
> I paid out in all $19,990. which left a balance of $10. which is herewith enclosed.
>
> I herewith enclose the Forms of Surrender, duly executed, the paysheets and a statements [sic] accounting for Cheque No. 28, $20,000., all of which I trust will be found satisfactory.[142]

---

[140] A surrender proposal had also been agreed to by the Keeseekoose Band, and a near identical surrender agreement was concluded with that Band on May 15, 1909.

[141] W.G. Blewett, Indian Agent, to the Secretary, DIA, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[142] W.M. Graham, Inspector of Indian Agencies (at Kamsack), to DSGIA, May 21, 1909, NA, RG 10, vol. 7770, file 27117-3 (extract of this document can be found at ICC Documents, p. 481).

A completed surrender document bearing the purported signatures or marks of seven band members was also forwarded to Ottawa at this time:

> Surrender of Key I.R. No. 65 – "Know all Men by these Presents that we, the undersigned Chief and Principal men of The Key band of Indians residents on our Reserve on the Assiniboine River in the province of Saskatchewan and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto Our Sovereign Lord the King, his Heirs and Successors forever, ALL AND SINGULAR, those certain parcels or tracts of land and premises situate, lying and being in the Key Indian Reserve, No. 65, in the Province of Saskatchewan containing together an approximate area of eleven thousand five hundred acres be the same or more or less being composed of [the 11,500 acres described by Bray]
>
> "It is hereby understood and agreed that the sum of One hundred dollars shall be paid to each Indian at the time of execution of these presents.
>
> "And upon the further conditions as follow, –
>
> 1. Indian children between the ages of twelve and eighteen to have their interest money funded for them.
> 2. In the event of implements, wagons, machinery, harness and stock being required for Indians to start farming, these may be purchased from the proceeds of the sale of the land.
> 3. That the land hereby surrendered be sold by public auction to the highest bidder."[143]

The inquiry record contains no evidence confirming whether the seven signatories to the surrender represented a quorum of eligible voters in attendance at the surrender meeting because Inspector Graham's surrender report, dated May 21, 1909, does not provide an account of the number of voting members in attendance. The surrender paylist, dated the same day as the surrender meeting, shows that 17 eligible voting members of The Key Band received their $100 cash payment that day.[144] The First Nation contends, however, that there were in fact 18 eligible voting members present on May 18, 1909, since one of the young men of the Band had been mistakenly recorded as being 20 years old.[145] Neither figure is conclusive, however, owing to the deficiencies in the Graham report, as noted above.

---

[143] Surrender document, The Key Band, dated May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–78).

[144] See the paylist included within "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18th, 1909," Lockhart & Associates, January 31, 1997 (ICC Exhibit 9).

[145] George Brass, the son of No. 28 Willie Brass, was recorded by the departmental officer as being 20 years of age on May 18, 1909. In her analysis of the paylist, however, Dorothy Lockhart, an experienced paylist researcher contracted by the First Nation, argued that George Brass turned 21 years of age on January 14, 1909, and was therefore eligible to vote at the surrender meeting in question. See "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18th, 1909," Lockhart & Associates, January 31, 1997, p. 3 (ICC Exhibit 9).

A Form 66 affidavit declaring that the surrender provisions of the *Indian Act* had been followed was signed jointly by Inspector Graham and Chief The Key on May 19, 1909. This document stipulated, among other things:

> That the annexed release or surrender was assented to by a majority of the male members of the said Band of Indians of the Key Reserve of the full age of twenty-one years then present ...
>
> That no Indian was present or voted at said council or meeting who was not a habitual resident on the Reserve of the said Band of Indians or interested in the land mentioned in the said Release or Surrender. ...[146]

All this documentation was forwarded to the Clerk of the Privy Council on June 8, 1909, along with a recommendation for acceptance from Superintendent General Oliver.[147] The surrender was confirmed by Order in Council PC 1379 dated June 21, 1909,[148] and the surrendered lands were offered for sale by public auction on December 1, 1910. Approximately 35 quarter sections of the surrendered lands did not sell at the auction.[149]

POST-SURRENDER EVENTS

On November 13, 1910, The Key Band surrendered an additional parcel of its reserve land for sale to the Church of England,[150] so that the mission school and church built on reserve lands could be protected from encroachment in the event of further surrenders. The event was described by the Reverend Harry B. Miller, a historian of The Key Band, in these terms:

> With the land being surrendered for white settlement less than a half-mile to the east, the area which included the St. Andrew's Church property was in jeopardy, as it also was reserve property. In order to assure its continued existence as part of the heritage of the people, it was decided that this property (9.09 acres), should be surrendered to "The King" for disposition to "the authorities of the Church of England" ... The surrender was agreed to and signed on December 13, 1910, with "nearly all of the band members present." The principal men actually signing the document of surren-

---

[146] Affidavit signed by Wm. Graham and Chief the Key, May 19, 1909 (ICC Documents, p. 480).

[147] Frank Oliver, Superintendent General of Indian Affairs, to the Governor General in Council, June 9, 1909, NA, RG 10, vol. 4099, file 329759 (ICC Documents, p. 482).

[148] OCPC 1379, June 21, 1909, NA, RG 2, Series 1 (ICC Documents, p. 483).

[149] See W.M. Graham, Inspector of Indian Agencies, to the Secretary, DIA, December 6, 1910 (ICC Documents, pp. 499–500), and Memorandum: W.A. Orr, In Charge of Lands & Timber Branch, DIA, to the DSGIA, January 30, 1911 (ICC Documents, p. 506).

[150] In 1955, the Church of England in Canada, as it was then known, became the Anglican Church of Canada. See *Gage Canadian Dictionary* (Toronto: Gage Educational Publishing, 1983), 43.

> der were: The Key - chief; George Brass - Headman; Thomas Brass, Willie Brass Jr., Peter O'Soup, Charles Thomas, James Key, George Brass Jr., Moses Brass.
>
> Thus it was assured that, no matter what might happen in future to other reserve property, St. Andrew's Church and property, as described in the surrender agreement, would remain, forever, the property of the church and the people of the Key Reserve.[151]

Agent Blewett took this surrender two weeks after the lands surrendered in 1909 had been sold at public auction. The surrender documents forwarded to Ottawa by Blewett bear the signatures or marks of nine presumably eligible voting members: Chief The Key, Headman George Brass Sr., Thomas Brass, Wm. Brass, Peter O'Soup, Charles Thomas, James Key, George Brass Jr., and Moses Brass.[152] An affidavit attesting to the validity of the surrender was executed in the presence of J.P. Wallace, Justice of the Peace, on December 23, 1910. Signed or marked by Blewett and Chief The Key, the affidavit was witnessed by A.A. Crawford, the Agency Clerk.[153]

In January 1911, Dr E.L. Cash, the local Member of Parliament, expressed interest in the sale of surrendered lands of The Key Band that had not sold when placed at public auction in December 1910. Perhaps as a result of this interest, the department decided to offer all unsold surrendered lands in the Pelly Agency for sale at public auction later that year.[154] As a result, the sale of these previously unsold lands generated additional revenue for The Key Band.

Shortly after the second auction, members of The Key Band made inquiries concerning interest payments due to them under the conditions of the May 18, 1909, surrender agreement.[155] Departmental accountants determined that no funds were available for distribution at the time, a decision that was conveyed to Blewett for explanation to the Band.[156] The record shows that an interest distribution of $10 per capita ($880 for entire Band) was paid to the band members in January 1913.[157] A subsequent interest distribution of $182 was paid to the Band in January 1914.[158] It is not possible to calculate the per capita payment for 1914, since the record does not include census information for that year. The record contains no further information concerning interest payments.

---

[151] See Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 39 (ICC Exhibit 6).

[152] Surrender document, The Key Band, dated December 13, 1910 (ICC Documents, pp. 501–03).

[153] Surrender Affidavit, dated December 23, 1910 (ICC Documents, p. 504).

[154] See Memorandum: W.A. Orr, In Charge of Lands & Timber Branch, DIA, to the DSGIA, January 30, 1911 (ICC Documents, p. 506), and "Keys, Keeseekouse (2nd Sale) & Cote, 2nd Sale," [sic] June 7, 1911 (ICC Documents, p. 507). In 1925, a third sale of unsold The Key IR 65 land was arranged, with prospective tenders being received by Indian Commission W.M. Graham. One such tender was received from W.G. Blewett, the former Indian Agent, who had started a new career as a real estate and insurance salesman. See W.G. Blewett, Kamsack, to W.M. Graham, Indian Commissioner, April 20, 1925 (ICC Documents, p. 555), and "Notice of Sale of Indian Lands," W.M. Graham, Indian Commissioner, April 29, 1923 (ICC Documents, p. 544).

[155] A.A. Crawford, Agency Clerk, to the Secretary, DIA, June 28, 1911 (ICC Documents, p. 508).

[156] See J.D. McLean, Assistant Deputy and Secretary, DIA, to W.G. Blewett, Indian Agent, December 13, 1911 (ICC Documents, p. 509).

Finally, the record in this inquiry does not include any evidence that any member of The Key Band made any contemporary complaint concerning the 1909 surrender.

---

[157] Indian Agent, Kamsack, to the Secretary, DIA, January 28, 1913 (ICC Documents, p. 516).

[158] W.G. Blewett, Indian Agent, to Secretary, DIA, January 12, 1914 (ICC Documents, pp. 527–28).

PART III

ISSUES

The Commission has been asked in this inquiry to determine whether Canada owes an outstanding lawful obligation to The Key First Nation as a result of events surrounding the surrender of a portion of IR 65 in 1909. The parties agreed to frame the issues before the Commission in the following manner:

Issue 1: Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

Issue 2: Was the *Indian Act*, RSC 1906, c. 81, complied with?

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

Issue 3: Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?

Issue 4: Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

We will address these issues in the following section of this report.

PART IV

ANALYSIS

ISSUE 1 VALIDITY OF THE 1909 SURRENDER

Was there a valid surrender in 1909 of a portion of The Key reserve by The Key Band?

In particular, were the Treaty 4 provisions regarding the consent of bands to the alienation of their reserve lands complied with?

Applicability of Treaty 4

A preliminary issue in this claim concerns the applicability of certain provisions of Treaty 4 to the process by which Indian reserve land is surrendered for sale or lease.

The *Indian Act* includes several procedural requirements regulating the surrender of Indian reserve land. These provisions govern the means by which consent to the alienation of Indian reserve land is obtained from the band for whom the land has been set aside. The Key First Nation submits that the wording of the treaty provides for a threshold of consent that exceeds and overrides the threshold provided for in the *Indian Act*. This argument is based on the following provisions of Treaty 4:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said *Indians*, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for *each family of five, or in that proportion for larger or smaller families.*
>
> Provided, however, that it be understood that if, at the time of the selection of any reserves as aforesaid, there are any settlers within the bounds of the lands reserved for any band Her Majesty retains the right to deal with such settlers as she shall deem just, so as not to diminish the extent of land allotted to the Indians; *and provided further that the aforesaid reserves of land, or any part thereof, or any interest or right therein, or appurtenant thereto, may be sold, leased or otherwise disposed*

> *of by the said Government for the use and benefit of the said Indians, with the consent of the Indians entitled thereto first had and obtained*; but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.[159]

In comparison, the surrender provisions of the 1906 *Indian Act* stipulated:

> **49.** Except as in this part otherwise provided, ***no release or surrender of a reserve***, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, ***shall be valid or binding, unless the release or surrender shall be assented to by a majority of the male members of the band of the full age of twenty-one years***, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[160]

The First Nation submits that the provisions of Treaty 4 were clearly intended to set aside reserve land for the benefit of all band members. As a result, counsel argues that it could not have been intended that the consent required for a valid surrender would need to have been obtained only from males aged 21 and over, as provided in the *Indian Act*. At a minimum, according to the First Nation, consent to surrender would have had to be obtained from "a majority of the Band members of sufficient age who would normally be involved in the decision making of the Band, given the custom of the Band at the time."[161] If this proposition were to be accepted by this Commission, it would clearly amount to a more stringent requirement than the provisions of the *Act*. These provisions require that a majority of male band members over the age of 21 years and habitually resident on or near, and interested in, the reserve in question attend a duly constituted surrender meeting, and that a majority of those in attendance vote in favour of the surrender.[162]

---

[159] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* 6 (Ottawa: Queen's Printer, 1966) (ICC Exhibit 15). Emphasis added.
[160] *Indian Act*, RSC 1906, c. 81, s. 49. Emphasis added.

Aware that a similar argument was raised and rejected by this Commission in the Kahkewistahaw surrender inquiry,[163] the First Nation has attempted to distinguish the ruling in the present case. Counsel submits that the treaty must be interpreted in this case in accordance with The Key First Nation's traditions of "clan governance," which were attested to by Chief Papequash in the community sessions held during the course of this inquiry.[164] Chief Papequash stated:

> In the exercise of leadership under the clan system a leader did not act upon his own initiatives, and that is the way that I act on behalf of my people today. I don't act upon my own initiatives. Like I said, the honour of one is the honour of all. In matters that concerned land, in matters that concerned government, defence, provisions of necessities, education and medical practices, he was expected to seek and rely upon the guidance of a council of leading clan fathers and mothers in the tribe.[165]

The First Nation submits that, as there was no evidence led in the Kahkewistahaw inquiry regarding the internal government of that Band, it is open to this Commission to reach a different result on this issue in this case.

Furthermore, the First Nation argues that its treaty right, having never been extinguished by the *Indian Act*, is therefore protected by section 35(1) of the *Constitution Act*, which would require the Crown to justify any infringement on that right in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Sparrow*.[166] Since the original surrender provisions of the *Indian Act* were enacted in 1868,[167] and therefore predate Treaty 4, the First Nation submits that it cannot have been intended that any legislated surrender provisions (even the subsequent 1906 *Act*) would have the effect of overriding the higher threshold established by Treaty 4.[168]

---

[161] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 10.

[162] *Indian Act*, RSC 1906, c. 81, s. 49.

[163] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), reported (1998) 8 ICCP 3.

[164] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 20.

[165] ICC Transcript, November 20, 1997, pp. 50–52 (Chief Papequash)

[166] *R. v. Sparrow* (1990), 56 CCC (3d) 263 (SCC).

[167] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 10, citing *Indian Act*, SC 1868, c. 42, s. 8.

In further support of its argument that the treaty right is protected by section 35(1) of the *Constitution Act, 1982*, the First Nation relies on the recent decision of the Supreme Court of Canada in *R. v. Marshall*.[169] In that case, the majority of the Court held that the nature of a treaty right may be determined with reference to extrinsic evidence concerning the historical and cultural context in which the treaty was concluded, even where the provision in question is not ambiguous on its face.[170] The majority also held that the Court must give effect to the common intention of the parties at the time of treaty signing, as opposed to merely giving effect to the terms of the document.[171]

Applying the above reasoning to the facts of his case, counsel for the First Nation submits that, at the time Treaty 4 was signed, it was the intention of the Crown and of the Band that consent to surrenders of reserve land would be obtained from "the Indians," or would be obtained "in accordance with the customs of the Band at the time." Counsel also argues that Canada has not introduced any evidence of an intention on the part of Parliament to modify or extinguish the treaty right in question. He states further that there is no evidence that the right has been modified or extinguished *in fact*, and that the burden of proof on this point lies on Canada.[172]

Canada's position on this issue is to rely on the previous ruling of this Commission in the Kahkewistahaw surrender inquiry. In that inquiry, the Commission disposed of this issue on the basis of two separate lines of reasoning. First, the Commission decided that no inconsistency exists between the 1906 *Indian Act* and Treaty 4 on the question of surrender requirements, as the latter does not establish a required level of consent or a means of expressing that consent. In the alternative, the Commission held that, at the time that the 1906 *Act* was proclaimed, dominion legislation could substantively affect treaty rights without constitutional restraint, since section 35 of the *Constitution Act, 1982*, which affirms existing aboriginal and treaty rights, did not yet exist.[173] Canada has also raised several objections with respect to the First Nation's submission concerning "clan governance," the first two of which concern the evidence required to establish the existence of the alleged governance structure.

---

[168] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 11.

[169] *R. v. Marshall*, [1999] SCJ no. 55, file 26014.

[170] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at paragraph 11.

[171] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at paragraph 40.

[172] James D. Jodouin to Indian Claims Commission, November 12, 1999, pp. 5–8.

[173] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

First, counsel for Canada argues that there is insufficient evidence on which to determine the nature of the Band's traditional governance structure, since the only evidence on this issue consists of excerpts of Chief Papequash's submissions at the community sessions. In support of this argument, he points to the lack of any formal research or analysis that establishes the exact nature of the First Nation's traditional form of government.[174]

Second, counsel states that the only other evidence on the record relevant to the issue appears to be inconsistent with the position taken by the First Nation, in that it contradicts the notion that women took part in the internal government of the Band.[175] As a result, counsel for Canada submits that, on the evidence, the alleged governance structure cannot be established as a fact.

Notwithstanding the foregoing evidentiary issues, Canada further states that, as a matter of law, the First Nation has not established that any particular decision-making process was imported into Treaty 4 that would acquire the protection of section 35(1) of the *Constitution Act, 1982*.[176] As well, counsel contends that section 35(1) should not be applied retrospectively to a historical event that took place before the *Constitution Act, 1982*, created the right sought to be vindicated.[177]

Finally, counsel for Canada states that the decision of the Supreme Court in *Marshall* is not applicable to the facts in The Key inquiry. First, he reiterates that, unlike the conflict between the particular treaty right and the specific legislative provision in *Marshall*, no conflict exists between the "consent" pursuant to Treaty 4 and the surrender provisions of the *Indian Act*. Rather, according to counsel, the surrender provisions are merely a "reasonable expression of the consent required under the Treaty."[178] Second, counsel submits that if there *are* any procedural inconsistencies between the surrender provisions of the 1906 *Indian Act* and those of Treaty 4, the former prevail, according to legal principles reaffirmed by the Supreme Court in *Marshall*.[179] Third, counsel takes the position that there is no compelling extrinsic evidence to support The Key First Nation's allegation that Treaty 4 contemplated a particular process by which consent to surrenders would be obtained.[180]

---

[174] Submission on Behalf of the Government of Canada, May 27,1999, p. 19.

[175] Submission on Behalf of the Government of Canada, May 27, 1999, p. 19.

[176] Submission on Behalf of the Government of Canada, May 27, 1999, p. 20.

[177] Submission on Behalf of the Government of Canada, May 27, 1999, p. 211.

[178] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 3.

[179] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 3.

As referred to earlier in this discussion, we determined in the Kahkewistahaw inquiry that the treaty was not in conflict with the 1906 *Act*. As we stated at that time:

> The treaty does not establish a required level of consent or a means of expressing such consent. Accordingly, the statutory surrender requirements represented a reasonable expression of the consent required under the treaty and, to the extent that those statutory requirements were satisfied, it can be said that the treaty requirements were likewise met.[181]

In the alternative, we held that, if the standards established by treaty and provided for in the *Act* were inconsistent, the surrender provisions of the *Act* would prevail:

> We agree with Canada that, when the 1906 *Indian Act* was proclaimed, federal legislation could substantively affect or regulate treaty rights to the extent that the legislation evinced a clear intention to modify a treaty right. At the time of the surrender, there was no constitutional restraint to preclude Canada from enacting such legislation since s. 35 of the *Constitution Act, 1982*, which recognizes and affirms existing aboriginal and treaty rights, did not yet exist.[182]

After the close of arguments in this inquiry, however, the Supreme Court of Canada released its decision in *R. v. Marshall*. This case held that extrinsic evidence concerning the historical and cultural context within which a treaty was concluded may be admitted for the purpose of interpreting a treaty right, even where the treaty provision in question is unambiguous. Since the First Nation's original submissions included the argument that the treaty term regarding "consent" to surrenders was to be interpreted with reference to Chief Papequash's oral evidence concerning "clan governance," the parties were given the opportunity to comment on the implications of *Marshall*, if any, to the facts of The Key inquiry. The respective submissions of the parties on this issue have been included in the above discussion, and have been considered by us in the course of making our determination on this issue.

---

[180] Richard Wex, Senior Counsel, DIAND Legal Services, to Indian Claims Commission, December 14, 1999, p. 4.

[181] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

[182] Indian Claims Commission, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3, n. 176 at p. 70.

On consideration of all the submissions, and the decision of the Supreme Court in *Marshall*, we have determined that the evidence presented in this case does not support the conclusion put forth by the First Nation – namely, that The Key Band had a treaty right to have decisions regarding the surrender of its reserve made according to its traditions of clan governance.

We take note of the comments of Justice Binnie, writing for the majority in *Marshall*, regarding the duty on the court in construing a treaty:

> The bottom line is the Court's obligation to "choose from among the various possible interpretations of the *common* intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (emphasis added) (*Sioui*, per Lamer J, at p. 1069).[183]

Justice Binnie, quoting above from the judgment of Lamer J in *R. v. Sioui*,[184] emphasized the importance of the intention of the parties at the time that the treaty was made. In the present inquiry, we do not have evidence that, *at the time Treaty 4 was made*, all the parties intended to establish within its terms a standard or threshold of consent for the surrender of land. Therefore, as in the Kahkewistahaw inquiry, we conclude that there is no evidence in this case of a conflict between the terms of Treaty 4 and the surrender provisions of the *Indian Act*, and that the challenge to the surrender cannot be upheld on this basis.

ISSUE 2 WAS THE INDIAN ACT, RSC 1906, C. 81, COMPLIED WITH?

In particular, did a majority of the male members of The Key Band who were 21 years of age and over assent to the surrender?

Surrender Provisions of the 1906 *Indian Act*

In order for a surrender of Indian reserve land to be valid, it is necessary that the parties comply with the procedural requirements in section 49, which, for ease of reference, we reproduce again:

> **49.** Except as in this part otherwise provided, no release or surrender of a reserve, or a portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, unless the release or surrender shall be

---

[183] *R. v. Marshall* (1999), 177 DLR (4th), 513 at 526 (SCC), Binnie J.

[184] *R. v. Sioui*, [1990] 1 SCR 1025 at 1069.

> assented to by a majority of the male members of the band of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General.
>
> 2. No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.
>
> 3. The fact that such release or surrender has been assented to by the band at such council or meeting shall be certified on oath by the Superintendent General, or by the officer authorized by him to attend such council or meeting, and by some of the chiefs or principal men present thereat and entitled to vote, before some judge of a superior county or district court, stipendiary magistrate or justice of the peace, or, in the case of reserves in the province of Manitoba, Saskatchewan or Alberta, or the Territories, before the Indian commissioner, and in the case of reserves in British Columbia, before the visiting Indian Superintendent for British Columbia, or, in either case, before some other person or officer specially thereunto authorized by the Governor in Council.
>
> 4. When such assent has been so certified, as aforesaid, such release or surrender shall be submitted to the Governor in Council for acceptance or refusal.[185]

Although compliance with subsections (2), (3), and (4) has been raised by the First Nation and will be dealt with in the context of other issues in this claim, the Band's primary substantive objection to the validity of the surrender lies in the allegation that the procedure by which the surrender was obtained did not comply with the requirements of section 49(1) of the *Act*.

The Supreme Court of Canada has considered the meaning of section 49 of the *Indian Act* in the case of *Cardinal v. R.*[186] In that case, Estey J provided the following summary of the *Act*'s surrender provisions:

> It has also been argued that the interpretation which is now being considered is one which exposes the membership of the band to a risk of loss of property and other rights, contrary to the general pattern and spirit of the *Indian Act*. It is perhaps well to observe in this connection that there are precautions built into the procedures of Pt. I of the Act, dealing with surrender. Firstly, the meeting must be called to consider the question of surrender explicitly. It may not be attended to at a regular meeting or one in respect of which express notice has not been given to the band. Secondly, the meeting must be called in accordance with the rules of the band. Thirdly, the chief or principal men must certify on oath the vote, and that the meeting was properly constituted. Fourthly, only residents of the reserve can vote, by reason of the exclusionary provisions of subs. (2) of s. 49. Fifthly, the meeting must be held in the presence of

---

[185] *Indian Act*, RSC 1906, c. 81, s. 49

[186] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3

> an officer of the Crown. And sixthly, even if the vote is in the affirmative, the surrender may be accepted or refused by the Governor in Council. It is against this background of precautionary measures that one must examine the manner in which the assent of eligible members of the band is to be ascertained under s. 49.[187]

The main issue in *Cardinal* was the definition of the requisite "majority" pursuant to section 49(1) of the *Act*. Estey J decided that a valid consent to a surrender did not require that an absolute majority of all eligible voting members vote in favour. Rather, he held that the section required only that a majority of eligible voters be in attendance at the meeting, and that a majority of those in attendance give their assent to the surrender.[188]

Therefore, it is clear from the above that section 49(1) comprises four components:

- meeting must be summoned for the express purpose of considering the surrender;
- the meeting must be summoned in accordance with the rules of the band;
- the meeting must be held in the presence of the Superintendent General or an authorized officer; and
- a majority of the male members of the band of the full age of 21 years must attend the meeting, and
- a majority of those attending must assent to the surrender.

The provisions of section 49(1) have been held to be mandatory in nature, with the result that a failure to comply with those terms will render a surrender void *from the outset*. In the words of the trial judge in the case of *Chippewas of Kettle and Stony Point*:

> Section 49(1) lays down, in my view, in explicit terms, a true condition precedent to the validity of any surrender and sale of Indian reserve lands. It makes this abundantly clear by saying that no such surrender "shall be valid or binding" unless its directions are followed.[189]

---

[187] *Cardinal v. R.* [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3 at 10

[188] *Cardinal v. R.*, [1982] 1 SCR 508, 13 DLR (4th) 321, 3 CNLR 3 at 10

[189] *Chippewas of Kettle and Stony Point v. Attorney General of Canada* [1996] 1 CNLR 54 at 83

This interpretation has been accepted by this Commission in previous inquiries.[190] As a result, if it is found on the facts of this case that the provisions of section 49(1) were not followed, the surrender must be considered void.

In this case, the parties have focused on the first and fourth of the foregoing criteria – namely, the requirement that a meeting be called for the purpose of considering the surrender, and the necessity of a valid majority consent. Although counsel for the First Nation has briefly raised the issue of whether the meeting was summoned in accordance with the rules of the Band, there is no specific evidence before this Commission regarding the existence of any such rules, and, as a result, our analysis will concentrate on the above two factors.

Surrender Meeting

The First Nation submits that there is no evidence of any kind that notice of a surrender meeting was ever given to the Band, nor is there credible evidence that a surrender meeting actually took place. This submission is based on three arguments. First, the First Nation points to the fact that the existing documentation provides scarcely any detail concerning the events that took place at the meeting, and provides no information at all that would indicate whether any notice of the meeting was provided to the Band. Second, the First Nation questions the authenticity of the surrender documents themselves. This objection is based on expert handwriting evidence concerning the appearance of the "X" marks that apparently signified the assent of the band members who signed the documents.[191] Third, counsel argues that the Band has no oral history concerning a surrender meeting. Given the lack of detail concerning the meeting, and the expert's testimony casting doubt on the authenticity of the documents, the First Nation submits that the absence of oral history must lead to a conclusion that no meeting ever took place.

In support of its argument that notice of the surrender meeting was not provided to the Band, the First Nation alleges that there exists no evidence in the historical record that *any* notice of any kind was ever provided by any departmental official in advance of the meeting allegedly held on May 18, 1909.[192]

---

[190] See ICC, *Inquiry into the 1907 Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3 at 68; ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 171.

[191] ICC Transcript, January 25, 1999 (Guy Magny).

[192] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 58.

In support of its allegation that no meeting took place, the First Nation points to the lack of a voters' list and to the absence of any minutes of the meeting identifying who was present, recording what was discussed, and tallying the votes for and against the surrender.[193] As part of this argument, it alleges that Inspector Graham's report concerning the surrender[194] contains so little detail that its value as evidence that a meeting took place is minimal. As a result, based on the lack of concrete evidence concerning a surrender meeting on May 18, 1909, counsel invites the Commission to draw an inference that no such meeting took place.

The First Nation further alleges that the surrender documents themselves (consisting of the surrender, Chief The Key's affidavit, and the surrender paylist apparently documenting the advance paid to each band member) cannot be accepted at face value. The objection to those documents as evidence is grounded in the belief that the documents are not "authentic"; in other words, the "X" marks on the documents were not made by the band members themselves, but by some other party, likely Inspector Graham.

In support of this allegation, the First Nation relies on the testimony of its expert witness, Guy Magny. Based on his opinion regarding the significant combination of similarities and the absence of significant differences among the "X" marks on all three documents, Magny concludes that they were all written by the same person. He further concludes that all the "X" marks were likely made by the same person who signed his name "W.M. Graham" on the impugned documents.[195] As Magny's evidence authenticates the "W.M. Graham" signature by comparison with other signatures made by Graham in the ordinary course of business over a six-year period, the First Nation submits that the "X" marks on the documents were made by Graham himself, and not by members of the Band.[196]

In further support of the argument that the "X" marks are not authentic, the First Nation relies on Magny's observations in light of certain historical departmental instructions to Indian agents regarding the procedures to be followed when a signature was required from an illiterate person. On July 28, 1904, Frank Pedley, the Deputy Superintendent General of Indian Affairs, circulated the following directive to Indian agents in the North-West Territories, which at that time comprised most of western Canada:

---

[193] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 81.
[194] W. M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).
[195] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 58–64.
[196] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 67.

> The Department's attention has been drawn to the fact that in some instances when Agents make payments to Indians and issue receipts, which should be signed by mark (the Indian touching the pen), the mark is made when the Indian is not present. According to law a valid receipt cannot be given by an illiterate person unless he touches the pen when "his mark" is being made. Agents are therefore warned that in the future the mark of an Indian must be made by the Indian touching the pen, and the act must be witnessed by a third party, who must sign as witness. Before an Indian makes his mark to a receipt or other document the transaction should be fully explained to him. These instructions apply also to the endorsation [sic] of cheques issued in favour of Indians ...[197]"

Magny concludes that, if the above procedure had been followed, the "X" marks on The Key surrender documents would have displayed irregularities and inconsistencies of pressure and movement, instead of the uniformity that is evident on the face of the documents.

As a result of all the above, the First Nation submits that the documents are not authentic. They cannot therefore be relied on in support of a conclusion that a surrender meeting took place in accordance with the requirements of the *Indian Act*.

The final basis for the First Nation's allegation that no meeting was held in accordance with the *Act* concerns the absence of any oral history among the elders of the Band about this event. Counsel for the First Nation refers to numerous examples from the transcript of the community sessions at which various individuals stated their belief that no meeting occurred. These beliefs are founded on the stories of their parents and grandparents to the effect that the surrendered portions of the reserve were taken from them by force or trickery, and not through any orderly process of consent.

For example, Elder Edwin Crane commented:

> On that question on that 1909 meeting, I asked the elder here, to his knowledge he was never ever even told about such a meeting, if there was meeting, a public meeting, he said he never recalled anything, never been told about that land loss that we had there. All of a sudden it's gone, that's all he said.[198]

Chief Papequash testified:

> In 1903 to 1909 there were no meetings amongst aboriginal peoples to discuss the land surrender. It was taken by force. ... The land surrender was imposed upon the

---

[197] Frank Pedley to J.H. Gooderham, July 28, 1904 (ICC Exhibit 11).

[198] ICC Transcript, January 24, 1996, p. 37 (Edwin Crane, translated by Lloyd Brass).

> aboriginal peoples through the dictatorship of the Indian Agent. Under no circumstances would our people ask for a surrender. Because our people at that time didn't, and our people today don't believe in ownership of the land, because it is the land that sustains the lives of the aboriginal peoples and all other races of the world.[199]

Desmond Key stated:

> Well as far back as I can remember I never heard anything about the – what we had surrendered. My grandad never ever mentioned anything to me about surrendering land.[200]

Counsel for the First Nation also argues that there is a notable absence of oral history concerning the alleged payment of the $100 advance to each band member. This absence is significant, in his view, because the receipt of $100 per member would have been a momentous event in the lives of each family, given the value of that amount of money in 1909.[201] In support of this argument, counsel cites evidence such as the following statement by Elder Robert Gordon:

> No one has ever mentioned getting anything for the land that was taken away from them. ... Well the understanding I got from the old people, that land was taken from them and they never received nothing for it.[202]

As a result, counsel submits that the lack of any historical memory concerning this event among the First Nation's elders is consistent with a theory that no meeting took place.

Canada, in contrast, takes the position that adequate evidence exists from which the Commission can conclude that a valid surrender meeting took place. First, counsel for Canada argues that the Commission may infer from the pre-surrender conduct of the Band that correct procedures were followed by the department in obtaining the surrender. In particular, counsel points to the evidence that the Band itself requested the surrender in July 1908,[203] that a pre-surrender meeting took place in January 1909,[204] and that the Band subsequently requested that the surrender be taken before ploughing was to begin in the spring of 1909.[205] As well, the evidence indicates that Canada intended to comply with its obligations regarding the procedures to be followed, as demonstrated by the fact that Inspector Graham was specifically instructed to take the surrender in accordance with the provisions of the *Indian Act*.[206]

---

[199] ICC Transcript, November 20, 1997, pp. 27–30 (Chief Papequash).

[200] ICC Transcript, March 10, 1998, p. 164 (Desmond Key).

[201] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 77.

[202] ICC Transcript, March 10, 1998, pp. 177–80 (Ronald Gordon).

[203] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[204] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

Second, Canada finds support for its position in the fact that the surrender document was apparently signed, by mark or actual signature, by seven individuals.[207] Counsel also relies on the affidavit of Chief The Key[208] attesting to the fact of the meeting, and on the reporting letter of Inspector Graham[209] to the same effect. Third, Canada submits that the post-surrender conduct of the Band – including requests for sale proceeds, the subsequent surrender of a parcel of reserve land for church purposes, and the lack of any contemporary objection to the 1909 surrender – is consistent with a theory that the correct procedures were followed and that the surrender was not obtained by trickery or deceit.

Fourth, Canada questions the evidentiary value of the oral history provided to the Commission at the community sessions. Counsel contends that the oral history provided in this case does not fit the definition of "oral history evidence" contemplated by the Supreme Court of Canada in *Delgamuukw v. British Columbia*.[210] It is argued that the Court referred to oral history evidence as the "sacred official litany, or recital of the most important laws, history, traditions" of a claimant which were "repeated, performed, and authenticated at important feasts."[211] Counsel for Canada submits that the Court intended that there be considerable formality and solemnity attached to such evidence:

> By way of content, oral history involves the recital of sweeping history over a lengthy time period – it does not involve whether certain statutory requirements were met in respect of a single transaction.[212]

---

[205] W.G. Blewett to J.D. McLean, April 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[206] Frank Pedley to W.M. Graham, February 13, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 466).

[207] "Surrender of Key I.R. No. 65," May 18, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 476–79).

[208] "Affidavit of William M. Graham and The Key," May 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 479).

[209] W.M. Graham, Inspector of Indian Agencies, to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[210] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

[211] Submission on Behalf of the Government of Canada, May 27, 1999, p. 32, citing: *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1072.

[212] Submission on Behalf of the Government of Canada, May 27, 1999, p. 32.

In the alternative, Canada submits that, if the elders' statements are found to be "oral history evidence," with the result that they are admissible on an equal footing with other forms of evidence, they should be critically evaluated in order to determine their proper weight. In this context, counsel argues that a critical review of the oral history evidence tendered by The Key First Nation leads to the conclusion that the evidence in question contains too many inconsistencies and contradictions to be given much weight in the determination of the factual issues in this claim.

In support of this submission, counsel for Canada notes that a number of elders declared that they did not know about the events leading up to the 1909 surrender or whether a meeting took place.[213] For example, he refers to the evidence of Raymond Brass, who stated:

> I don't really know a thing about the surrender. Its just stories that I've heard ... I don't really know a thing about the surrender. Its just little bits here and there that I've heard.[214]

Counsel for Canada also refers to excerpts from the evidence of Charles Cochrane, Edwin Crane, William Papequash, Desmond Key, Helen Stevenson, and others to the same effect.[215]

In addition, counsel submits that the evidence of various band informants is inconsistent on the issue of the literacy of The Key band members at the time of the surrender,[216] and on other issues conflicts directly with documentary evidence on the record, including evidence not challenged by the Band's counsel.[217] As a result, he submits that the oral history should not outweigh the documentary evidence in the determination of the issues in this case.

Finally, Canada challenges the testimony offered by the First Nation's handwriting expert. Although counsel for Canada takes issue with the correctness of some of Mr Magny's conclusions, in particular whether the "X" on Chief The Key's affidavit was also made by the same person who placed all the "X" marks on the surrender document, counsel's main objection to this testimony is based on its relevance.[218]

---

[213] Submission on Behalf of the Government of Canada, May 27, 1999, p. 34.

[214] ICC Transcript, January 24, 1996 (ICC Exhibit 2, p. 7) (Raymond Brass).

[215] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 35–36.

[216] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 37–38.

[217] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 36–39.

[218] The Crown has made its submissions regarding the expert testimony in connection with criterion 4 – "Majority Assent"; however, as the First Nation has raised this issue in connection with criterion 1, the Crown's position will be discussed at this point.

Canada submits that, even if every "X'" on the surrender document was placed there by one person, instead of by the individual members of the Band, that fact is legally irrelevant, since there is no legal requirement that *any* band members sign the surrender document.[219] Furthermore, counsel submits that it is a longstanding principle of law that an illiterate person can validly "sign" a document if he authorizes another to sign it in his name or by a mark.[220] Therefore, even if all the marks were made by Inspector Graham, as Magny alleges, that fact *by itself* is not legally significant in the view of the counsel for Canada, since it is possible that band members authorized Graham to make the marks in question.[221]

Canada further submits that there is no legal or statutory requirement that Indian agents comply with the 1904 departmental directive regarding "touching the pen"[222] to validate documents signed by mark. As a result, according to counsel, Magny's testimony that the directive could not have been complied with in this case is of no significance.[223]

In conclusion, counsel for Canada submits that there exists sufficient evidence on the record to clearly establish that a surrender meeting took place on May 18, 1909.

As the evidence with respect to the surrender meeting is intertwined with the evidence relevant to the question of majority assent, the findings of the Commission on both points will be discussed together, following our review of the parties' positions on the latter issue.

Majority Assent

As indicated previously,[224] the Supreme Court of Canada in *Cardinal* has interpreted "majority assent" within section 49(1) of the *Indian Act* to mean that a majority of the male band members of the full age of 21 years must attend the surrender meeting, and that a majority of those in attendance must in turn assent to the surrender.

The First Nation takes the position that there exists no reliable evidence that the "double majority" referred to by Estey J was met in the present case.

---

[219] Submission on Behalf of the Government of Canada, May 27, 1999, p. 45.

[220] Submission on Behalf of the Government of Canada, May 27, 1999, p. 46, citing *London County Council v. Agricultural Food Products*, [1952] 2 All ER 229 (CA).

[221] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 46–47.

[222] Departmental Circular of Frank Pedley, DSGIA, to J.H. Gooderham, Indian Agent, July 28, 1904 (ICC Exhibit 11).

[223] Inquiry into the Matter of The Key First Nation regarding the 1909 Surrender Claim: Oral Submissions, June 14, 1999, pp. 160–61.

[224] *Cardinal v. The Queen*, [1982] 1 SCR 508, 13 DLR (4th) 321, [1982] 3 CNLR 3.

With respect to the first majority – namely, that a majority of eligible voters in the Band attend the surrender meeting – counsel relies on a report prepared by Lockhart and Associates[225] for this inquiry at the First Nation's request. The authors of this report conclude that there were 18 eligible voters at the time of the surrender, of whom ten would constitute a majority. Counsel for the First Nation states that the only documentary evidence concerning attendance at the meeting is Inspector Graham's letter of May 21, 1909. This letter, in which Graham reported that "nearly all the members of the Band were present,"[226] is ambiguous, in counsel's view, since it is not possible to determine the age or genders of the members who attended. Therefore, it is submitted that there is no proof that the required majority of eligible male voters attended.[227]

The second majority referred to in the judgment of the Supreme Court in *Cardinal* concerns the requirement that a majority of voters in attendance at the meeting vote in favour of the surrender. Counsel for the First Nation argues that, although Graham's reporting letter states that the "vote was unanimous,"[228] it cannot be determined if the second majority was met in this case because it is not known how many eligible voters attended the meeting.[229]

Counsel for the First Nation also finds it significant that the surrender document itself was marked or signed by only seven band members, given Inspector Graham's comments that the vote had been unanimous. Counsel argues that, if a proper majority of at least ten voters had attended (out of the 18 considered eligible by Lockhart and Associates), it would be expected that all of them would have marked or signed the document.[230]

As well, the First Nation points out that the surrender paylists of May 18, 1909, indicate that at least 14, and possibly as many as 17, males over the age of 21 years received their $100 advance on the day of the surrender. Assuming for the sake of the argument that the paylists are authentic, counsel submits that, if all these individuals attended the surrender meeting as well, it might be expected that this majority would have signed the surrender document. Therefore, he finds it suspicious that only seven signed or made their mark and, accordingly, he invites the Commission to infer that the majority requirement was not met.[231]

---

[225] "Those Eligible to Vote in the Alleged Surrender of The Key Reserve May 18, 1909," Lockhart and Associates, January 31, 1997 (ICC Exhibit 9).

[226] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[227] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 89–90.

[228] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[229] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 91– 92.

[230] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 92– 95.

For its part, Canada submits that the historical documents created at the time of the surrender should be accepted at face value as proof that both majorities were met.

In support of his argument that the "first majority" required by the *Indian Act* was attained, counsel for Canada relies on the surrender affidavit of Chief The Key and Inspector Graham.[232] It attests to the fact that a majority of eligible voters was in attendance at the surrender meeting. He also relies on Graham's reporting letter,[233] which states that "nearly all the members of the Band were present" at the surrender meeting, and finds further support in the surrender paylist,[234] which indicates that at least 14 eligible voters were present on that day to receive their advance.

Counsel for Canada also relies on the above affidavit and reporting letter in support of his position that the "second majority" was attained. Specifically, he states that Graham's report that the "vote was unanimous" is the best evidence that a majority of voters present at the meeting voted in favour.

With respect to the First Nation's argument that non-compliance with the *Act* can be inferred from the fact that only seven voters signed or marked the surrender document, counsel for Canada points out that there exists no legal requirement that *any* voters sign the surrender document. He also argues, for reasons discussed earlier, that the expert witness's conclusion regarding the author of the "X" marks is legally irrelevant to the issue of consent, since the voters could have authorized anyone, including Inspector Graham, to make the marks on their behalf.[235]

Finally, Canada submits that the Band's conduct following the surrender is consistent with a conclusion that the correct procedures were followed in obtaining the surrender. As discussed earlier, counsel points out that there is no record of any contemporaneous objection to the surrender on the part of the Band. Relying on the statement of Campbell J in *Chippewas of Sarnia Band v. Canada (Attorney General)*[236] to the effect that knowledge of a surrender, together with a failure to complain, may provide evidence of consent to the surrender, counsel submits that the Commission may infer that consent was given in this case.[237]

---

[231] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, pp. 96–97.

[232] "Surrender Affidavit," Chief of The Key Band of Indians, May 19, 1909 (ICC Documents, p. 479).

[233] W.M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

[234] The Key Band Paylist, May 18, 1909, NA, RG 10, vol. 9845 (ICC Exhibit 8A, and K2 (1 to 5)).

[235] Submission on Behalf of the Government of Canada, May 27, 1999, p. 53.

[236] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406, Court File No. 95-CU-92484 at paragraph 220.

Compliance with Section 49(1) of the *Indian Act*

As alleged by the First Nation and conceded by Canada, this surrender was sparsely documented. The documents that *do* exist are a surrender document marked or signed by seven individuals, the affidavit of Chief The Key and Inspector Graham, and a brief report by Inspector Graham. Each of these documents, on its face, attests to the fact that a surrender meeting was held. The affidavit of the Chief and Inspector Graham attests to the fact that a majority of eligible voters assented to the surrender.[238] Inspector Graham's report states that "nearly all" the band members attended the surrender meeting and that the vote was "unanimous."[239]

The Band submits that, given the scarcity of information concerning the surrender, the existing documents cannot be taken at face value in light of two factors: the expert evidence casting doubt on the authenticity of the "X" marks on the surrender, and the lack of any mention of the surrender in The Key First Nation's oral history.

With respect to the testimony of handwriting expert Guy Magny, we do not propose to engage in a substantive discussion concerning his qualifications or methodology, or the substantive bases for his conclusions. Rather, it appears clear to us that, even if we accept all his conclusions – that all the "X" marks on the document were made by Inspector Graham – his testimony cannot determine whether band members authorized Graham to make the marks on their behalf. As correctly pointed out by counsel for Canada, the *Indian Act* does not mandate that the surrender document be signed or marked by those voting in favour. Further, at common law, a person may validly execute a document by authorizing another to sign or mark it on his behalf. Therefore, Magny's testimony is not relevant to the issue of compliance with the procedural requirements of section 49(1) of the *Indian Act*, since the *Act* does not require that the eligible voters personally sign or mark the surrender document. As a result, Magny's testimony does not support the

---

[237] Oral Submissions, June 14, 1999, p. 141.

[238] Affidavit of William M. Graham and The Key, May 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 479).

[239] W. M. Graham to Department of Indian Affairs, May 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 481).

First Nation's allegation that a surrender meeting was not held, nor does it assist its contention that a proper majority was not attained.

Parenthetically, we might add that one aspect of Magny's testimony may have had the unintended effect of supporting Canada's submission that the proper procedures *were* followed. From Magny's report, it appears that the signatures of "Peter O'Soup" and "Charles Thomas," the two band members who apparently signed the surrender document, "revealed a significant combination of similarities and no significant differences"[240] when compared with the specimen signatures of those two individuals taken from later documents. Given that there has been no allegation, or any evidence, that these individuals were involved in any irregularities in the procurement of the surrender, we find that the authentication of these signatures is evidence in favour of the surrender's validity.

Turning to the oral history evidence, we are mindful of the decision of the Supreme Court in *Delgamuukw v. British Columbia*[241] in which Chief Justice Lamer stated:

> Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.[242]

Although the Commission accepts and has applied the above principle in prior inquiries, we also take the view that the "equal footing" referred to by the Chief Justice does not amount to special status, nor does it have the effect of assigning greater weight to oral history than to any other evidence. Accordingly, any oral evidence submitted in this inquiry will be weighed and considered along with all the other evidence in our determination of this issue.

In the present inquiry, the First Nation submits that the lack of oral history concerning the surrender meeting must lead to the conclusion that the event never took place. We do not accept the principle that the absence of oral history evidence of necessity leads to this conclusion. Further, we have difficulty in accepting the notion that an *absence* of evidence, including oral history evidence, can fulfil the obligation on a claimant to make its case in accordance with the Specific Claims Policy. As we stated in the Moosomin inquiry:

---

[240] Guy Magny, "Forensic Handwriting & Document Examination Report," July 8, 1998 (ICC Exhibit 8A), p. 9.
[241] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.
[242] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1069, Lamer CJ.

> The general principle with respect to the burden of proof and onus is that the First Nation, as the claimant, bears the burden of proving that the Crown has breached its lawful obligations.[243]

In making the above determination, we are not criticizing in any way the evidence given by the elders at the community sessions. It is not in the least unexpected that the elders would not have information concerning an event which, in most cases, took place before they were born. Nor are we suggesting that the band members on whose information they relied were not telling the truth. Rather, we hold that the absence of oral history evidence is not determinative of the issue of compliance with the procedural requirements of the *Indian Act*, and that we must examine all the evidence submitted in the inquiry before we can reach any conclusion on the issue.

We are mindful of the scarcity of evidence regarding the surrender meeting itself, which is a situation that causes us some concern. As a result, we must determine from other evidence on the record in this inquiry whether the procedural requirements of the *Indian Act*, in particular the requirement of majority consent, were met in this case. We find support for this approach in the guiding principle governing the determination of a surrender's validity articulated by Justice Gonthier in *Apsassin v. The Queen:*

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void ... In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the *sui generis* nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings.[244]

In the above case, Justice Gonthier noted that the Band had known for some time that an absolute surrender of the reserve was contemplated, and he found that fact relevant in determining the band members' intention when they agreed to the surrender.

---

[243] ICC, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), (1998) 8 ICCP 101 at 202.

[244] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 358 (SCR) 358–59.

Similarly, the trial judge in *Chippewas of Sarnia Band v. Canada (Attorney General)* stated that a failure on the part of band members to complain *after* a surrender was taken could, in some circumstances, be evidence of consent:

> Although knowledge is not consent it may, in some cases, when coupled with lack of complaint, provide some evidence of consent or agreement.[245]

The above approach is consistent with principles developed in the general law of contract to the effect that the *existence* of a legally binding contract may be inferred from the subsequent conduct of the parties, even in circumstances where there exists an imperfect written instrument that one party seeks to disavow.[246] As a result of all the foregoing, we have taken note of documentary evidence concerning events that both preceded and followed the surrender in making our determination of the surrender's validity.

As pointed out by counsel for Canada, it appears that the Band requested the surrender in July 1908,[247] and that it subsequently requested that the surrender be taken before ploughing was to begin in the spring of 1909.[248] Further, the First Nation does not dispute that a pre-surrender meeting took place in January 1909, at which the Band, on the one hand, and Inspector Graham, representing the department, on the other, apparently agreed to new terms of surrender.[249]

As well, a number of significant events took place after the surrender. The paylist dated May 18, 1909,[250] indicates that each band member was paid $100 in fulfilment of one of the terms of the surrender. While it is true that the First Nation has challenged the authenticity of this document, based on handwriting expert Guy Magny's testimony that the "X" marks were not made by band members, we stand by our earlier conclusion that we do not find Magny's testimony to be relevant to the issue of the authenticity of the documents, since it is possible that band members authorized Inspector Graham to make the marks on their behalf.

---

[245] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406 at paragraph 220 (Ontario Superior Court of Justice).

[246] *DiGiacomo v. DiGiacomo Canada Inc. et al.* (1989), 28 CPR (3d) 77 at 85 (Ontario High Court of Justice).

[247] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[248] W.G. Blewett to J.D. McLean, April 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[249] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[250] Paylist: "Key Band, May 18th 1909," NA, RG 10, vol. 9845 (ICC Exhibit 8A, Document K-2 (1 to 5)).

Of equal significance is the evidence that band members conducted themselves long after the surrender in a manner consistent with the theory that the correct procedural requirements of the *Indian Act,* including a meeting and consent by the proper majority, had been followed. For example, more than a year after the 1909 surrender, the Band surrendered another parcel of its reserve land for sale to the Church of England.[251] As well, the land surrendered in 1909 that remained unsold after the first auction was offered for sale again on June 7, 1911. Later that month, Chief The Key approached the agent inquiring when band members could expect interest money generated from the sale.[252] An interest payment of $10 per capita was paid to band members in January 1913,[253] followed by a further distribution of interest funds in January 1914.[254]

We have discussed the post-surrender conduct of the Band in some detail, because, of necessity in our view, it assumes greater importance in circumstances where the evidence surrounding the surrender itself is scarce or equivocal. Although we are not satisfied with the lack of evidence concerning events on the day of the surrender, we conclude that, in this case, the post-surrender conduct is consistent with the theory that all the proper surrender procedures were followed. Therefore, based on all the evidence, including the Band's actions in pursuing the surrender, the existence of two apparently authentic signatures on the surrender document, and the post-surrender conduct of the Band, we conclude that the First Nation has not discharged the general burden upon it to establish that Canada did not comply with the surrender procedures of the *Indian Act.*

ISSUE 3 WERE THE SHOAL RIVER INDIANS MEMBERS OF THE KEY BAND IN 1909?

Were the Shoal River Indians members of The Key Band at the time of the surrender in 1909, and, if so, were they entitled to vote on the surrender?

Membership and Eligibility to Vote

Because the surrender provisions of the *Indian Act* require that a majority of male members of the Band over the age of 21 attend any surrender meeting, it becomes important to determine whether the Shoal River Indians were members of The Key Band at the date of the surrender. As it appears from the historical evidence that the Shoal River Indians were followers of Chief The Key at one time, it must therefore be determined whether they achieved autonomy as a band prior to the date of surrender. If they did, then they would not have been members of The Key Band and, accordingly, would not have had any right to attend the surrender meeting or vote on the surrender. If they did not constitute a separate band by the relevant date (and were therefore members of The Key Band), then it is necessary to determine whether they were habitually resident on or near, and interested in, the reserve within the meaning of section 49(2) of the *Act*, since the latter requirement will further determine their eligibility to vote on the surrender. If they *were* eligible to vote according to the provisions of the *Act*, then the surrender is void, since it is not in dispute that they did not attend the surrender meeting or vote on the surrender. The addition of their numbers to the eligible voting population would mean that the *Act*'s majority voting requirements were not met.

---

[251] Surrender, The Key Band of Indians, December 13, 1910 (ICC Documents, pp. 501–03).

[252] A.A. Crawford to the Secretary, Department of Indian Affairs, June 28, 1911 (ICC Documents, p. 508).

[253] Indian Agent, Kamsack, to the Secretary, Department of Indian Affairs, January 28, 1913 (ICC Documents, p. 516).

[254] W.G. Blewett to the Secretary, Department of Indian Affairs, January 12, 1914 (ICC Documents, pp. 526–27).

Autonomy

The First Nation takes the position that the Shoal River Indians were "simply members of The Key Band who may not have resided on the Reserve," and that representatives of the department improperly excluded them from voting on the surrender.[255] In support of this argument, counsel for the First Nation relies on several factors which, in his view, constitute evidence that the Shoal River Indians and the followers of Chief The Key at Pelly were in fact one band for the purposes of the *Indian Act*.

First, counsel finds it significant that IR 65 was surveyed to include 38 square miles, which, under the terms of Treaty 4, was approximately sufficient for both groups. He also states that, for many years, the department refused to give the Shoal River Indians their own reserve and expected them to relocate to Pelly.[256] As well, when reserve land was finally set aside at Shoal River, several of the orders in council establishing the reserves referred to the land as having been surveyed for "the Band of Chief 'The

---

[255] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 97.

[256] L.W. Herchmer to Indian Commissioner, October 10, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 111); L.W. Herchmer to Indian Commissioner, May 6, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 142–45).

Key'"[257] and "The Key Band."[258] Counsel states that the division of the Band into two separate paylists in 1902 was an administrative convenience for the department, and not an acknowledgment of the Shoal River Indians' autonomy as a band. He finds support for this argument in the view of Inspector Graham, who appeared to believe that an "order of the Department" was required to separate the original band into two autonomous bands.[259]

Canada takes the opposite position on this issue and submits that, from at least 1882, The Key Band and the Shoal River Indians were two separate bands for the purposes of the *Indian Act*.[260] In support of this conclusion, counsel relies on the fact that the Shoal River Indians did not follow Chief The Key to the new reserve at Pelly in 1881, but instead requested that the department give them reserve land and pay them their annuities at Shoal River.[261] Counsel further points out that the Shoal River Indians petitioned the department for their own reserve at least three times: in 1882,[262] in 1884,[263] and in 1885.[264] He argues that, on these occasions, the Shoal River Indians repeated their desire to remain where they were, repudiated the leadership of Chief The Key, and disavowed any interest in the new reserve at Pelly.[265]

Counsel also states that the two groups differed ethnically, lived 90 miles apart, and pursued different economic livelihoods. He points out that, in 1893, the Shoal River Indians were granted the use of a number of reserves around Shoal River. In 1902, the department placed the Shoal River Indians on a separate paylist entitled "Shoal River Band paid at Shoal River Reserve" and transferred responsibility for them to the Lake Manitoba Inspectorate, actions that, Canada submits, amounted to official recognition of their status as a separate band. Canada also submits that The Key Band at Pelly viewed itself as politically distinct from the members of the Shoal River group, as evidenced by the fact that the latter were not included in discussions concerning the 1903 surrender, and were expressly excluded by The Key Band from any participation in the 1909 surrender discussions.[266] Counsel for Canada also points out that evidence from First Nation member William Papequash presented at the March 10, 1998, community session supports its submission that the two groups were autonomous by 1909:

---

[257] Order in Council, July 20, 1895, NA, RG 10, vol. 3575, file 215 (ICC Documents, p. 278).

[258] Order in Council, PC 8863, September 30, 1895 (ICC Documents, pp. 282–85).

[259] W. M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

[260] Submission on Behalf of the Government of Canada, May 27, 1999, p. 54, citing "Research Memorandum regarding the Establishment of the Shoal River Band, Manitoba, and Its Relationship to The Key's Band, Saskatchewan," November 1998 (ICC Exhibit 13).

[261] Submission on Behalf of the Government of Canada, May 27, 1999, p. 56.

[262] John Beardie, Headman [and 17 others], Shoal River, to Indian Agent, Treaty 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

[263] John Beardie et al. to L. Vankoughnet, January 1, 1884, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 127–30).

[264] John Beardie, Headman [and one other], to E. McColl, Inspector of Indian Agencies, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

[265] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 56–57.

> Q. Do you know if they got involved with each other's band councils ... did they ... get involved politically between the two bands?
>
> A. Not that I can remember, like you could always tell them apart ... But no, I don't think ... they got together politically.[267]

Counsel for Canada refers to the decision of this Commission in the Young Chipeewayan inquiry, in which we stated that a "band" within the meaning of the *Indian Act* refers to a body of Indians who live as a "collective community" under the legislative scheme established by the *Act*. Based on the foregoing evidence, he submits that the followers of Chief The Key at Pelly and the Shoal River Indians did not exist as a "collective community" at the time of the 1909 surrender. As a result, counsel submits that the Shoal River Indians were an autonomous band and did not have the right to attend the surrender meeting or vote on the surrender of part of IR 65.

The Commission notes that the *Indian Act* of the day did not provide for the division of one band into two separate and autonomous bands. Rather, since 1876, the *Act* has defined a "band" as

> ... any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible ...[268]

We have had occasion to comment on this definition in the Young Chipeewayan inquiry,[269] in which we stated:

> In our view the term "band" within the meaning of the *Indian Act* clearly refers to a body of Indians who live as a collective community under the auspices of that legislation.[270]

---

[266] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 58–59.

[267] Submission on Behalf of the Government of Canada, May 27, 1999, p. 60, citing ICC Community Session, March 10, 1998, pp. 156–57 (William Papequash) (Exhibit 3).

[268] *Indian Act*, RSC 1876, c. 18, as amended.

[269] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), (1995) 3 ICCP 175.

[270] ICC, *The Young Chipeewayan Inquiry into the Claim regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), (1995) 3 ICCP 175 at 198.

We are impressed in this case by the evidence indicating that the two groups – the followers of Chief The Key at Pelly and the Shoal River Indians – repeatedly communicated their intention to live separately as autonomous entities. As early as 1882, the Shoal River group presented a petition to the Indian Agent in which they repudiated the leadership of Chief The Key, disavowed any interest in IR 65, and requested that they be given their own reserve at Shoal River.[271] Similar petitions from this group were forwarded to officials of the department in 1884 and 1885.[272] The evidence also indicates that, by January 1909 at the latest, the followers of Chief The Key did not consider the Shoal River Indians to be "shareholders in their Reserve" and were "quite contented to relinquish any claim they may have to the Shoal River Reserve."[273]

The Department of Indian Affairs separated the two groups administratively in 1902, placing the Shoal River Indians on a separate paylist, paying them annuities in their community, and transferring responsibility for them to the Lake Manitoba Inspectorate. While this administrative action is significant, it is not in our view determinative. Rather, it appears to us that it is the intention of the band, or of the groups within a band, that must take priority in determining whether a single "band" separated into two autonomous "bands" within the meaning of the *Indian Act*.

In light of the above evidence, especially the evidence relating to the mutual intention of the two groups to live as autonomous entities, it cannot be said that the Shoal River Indians and the followers of Chief The Key constituted a "collective community" of the kind contemplated in our previous decision in the Young Chipeewayan inquiry. As a result, we hold that the two groups were not one "band" for the purposes of the *Indian Act*.

In the event that we are wrong and that the two groups *were* one band for the purposes of the *Indian Act*, we will make a further determination regarding the eligibility of the Shoal River Indians to vote on a surrender pursuant to the residency requirements of the *Act*.

---

[271] John Beardie, Headman [and 17 others], to Indian Agent, Treaty 4, August 26, 1882, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, pp. 109–10).

[272] John Beardie et al. to L. Vankoughnet, January 1, 1884, NA, RG 10, vol. 7770, file 27227-2 (ICC Documents, pp. 127–30); John Beardie, Headman [and one other], to E. McColl, February 20, 1885, NA, RG 10, vol. 3575, file 215 (ICC Documents, pp. 138–41).

[273] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

Habitual Residence

As we have seen, the *Indian Act* permits only those band members who habitually reside on or near, and are interested in, the reserve in question to vote on its surrender.

The First Nation has not made any arguments with respect to the habitual residence of the Shoal River Indians, other than the general statement that the latter were improperly excluded from the surrender vote.[274] Canada, however, has made several arguments in support of its position that the Shoal River Indians were precluded from voting on the surrender because they were not habitually resident on or near the reserve, as required by the *Act*.

In Canada's view, the evidence clearly indicates that none of the Shoal River Indians lived "on" The Key Reserve, and, as a result, the only issue is whether they lived "near" it, within the meaning of the *Act*. Although this provision of the *Indian Act* has not been interpreted by the courts, counsel for Canada argues that "near" is a relative term and must be interpreted according to the particular circumstances of the case. In this case, according to counsel, the circumstances in question include "the lifestyle of the band members, the distances travelled by band members in accordance with this lifestyle, reliance by the Indians on the reserve in question for economic, social, or other purposes as well as the need to ensure an efficient means for a band to be able to surrender its reserve land."[275]

Applying these principles, counsel submits that the evidence establishes that the Shoal River group did not reside "near" The Key reserve within the meaning of the *Indian Act*. His reasons in support of this finding include the fact that the lifestyle of the Shoal River Indians was largely centred around fishing in the Shoal River area, and that there is no evidence that they pursued their hunting and fishing lifestyle by travelling distances equal to the distance between their reserves and The Key reserve. Counsel also states that prior to the department's 1902 decision to pay annuities to the group at Shoal River, members of that group repeatedly complained about having to travel to The Key reserve for their payments. Moreover, they did not rely on The Key reserve for social, economic, or any other purpose by the time of the 1909 surrender.[276]

---

[274] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 1, p. 97.

[275] Submissions on Behalf of the Government of Canada, May 27, 1999, pp. 66–67.

[276] Submissions on Behalf of the Government of Canada, May 27, 1999, p. 67.

Based on the above evidence, it appears clear to this Commission that the Shoal River Indians did not have the right to vote on the 1909 surrender pursuant to section 49(2) of the *Indian Act*, which states:

> **49(2).** No Indian shall be entitled to vote or be present at such council, unless he habitually resides on or near, and is interested in the reserve in question.[277]

After an examination of various judicial authorities, we commented on the meaning of the term "habitually resides" in the recent Duncan's First Nation inquiry.[278] We concluded:

> In summary, we take from these authorities that an individual's "habitual" place of residence will be the location to which that individual customarily or usually returns with a sufficient degree of continuity to be properly described as settled, and will not cease to be habitual despite "temporary or occasional or casual absences."... such residence entails "a regular physical presence which must endure for some time ..."[279]

In the above inquiry, we also discussed the meaning of the word "near" within the context of section 49(2) of the *Act*. We determined that the concept was a relative one, to be decided on a case-by-case basis, having regard, among other things, to the general use of the reserve and the residence patterns of the band members.[280]

The evidence in this inquiry clearly establishes that the Shoal River Indians never lived on IR 65, that until 1902 they travelled there only once a year to collect their annuities, and that after 1902 they made no use of the reserve at all. Furthermore, although the parties did not argue the point, we find it difficult to see how the Shoal River Indians can be considered to have been "interested in" IR 65 at the time of the surrender, having repeatedly disavowed any interest in it from 1882 forward.

Therefore, as a result of all the above, we have determined that the Shoal River Indians were not entitled to vote on the surrender because they did not reside on or near, and were not interested in, IR 65 at the relevant time.

---

[277] *Indian Act*, RSC 1906, c. 81, s. 49(2).

[278] ICC, *Duncan's First Nation Inquiry Report On: 1928 Surrender Claim* (Ottawa, September 1999).

[279] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 131.

[280] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 136.

ISSUE 4 DID CANADA BREACH ITS FIDUCIARY OBLIGATIONS TO THE KEY BAND?

Did Canada have any pre-surrender fiduciary obligations to The Key Band and, if so, did Canada fulfil or did Canada breach any such fiduciary obligations with respect to the surrender of 1909?

In particular, was the surrender obtained as a result of undue influence or misrepresentation?

Nature of the Pre-surrender Fiduciary Duty

In several of its prior inquiries involving allegedly wrongful surrenders, and most recently in the Duncan's First Nation claim,[281] the Commission has conducted extensive examinations of the legal authorities governing the fiduciary obligations of the Crown before the taking of a surrender of reserve land. Although this analysis will not be repeated in detail, it is useful to highlight the principles that have evolved from the courts' consideration of the above issue.

Beginning with the decision of the Supreme Court of Canada in *Guerin v. The Queen*, which established the principle that the Crown stands in a fiduciary relationship with aboriginal peoples, Canada has been required to conduct itself according to a strict standard of conduct when a surrender of reserve land is obtained. As we stated in our report concerning the land surrender claim of the Kahkewistahaw First Nation:

> The *Guerin* case is instructive for two reasons: first, it determined that the relationship between the Crown and First Nations is fiduciary in nature; second, it clearly established the principle that an enforceable fiduciary obligation will arise in relation to the sale or lease of reserve land by the Crown on behalf of, and for the benefit of, a band to a third party *following* the surrender of reserve land to the Crown in trust. However, the Supreme Court of Canada was not called upon in *Guerin* to address the question whether the Crown owed any fiduciary duties to the band *prior to* the surrender. That issue was not specifically addressed until *Apsassin* appeared on the Court's docket.[282]

The decision of the Supreme Court in *Apsassin v. The Queen*[283] not only confirmed that Canada must conduct itself according to the high standards required of a fiduciary in its dealings with a Band *prior to* the taking of surrender, but also set out the principles by which it would be determined whether that duty had been met. As the Commission stated in its report concerning the Moosomin surrender claim:

---

[281] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Inquiry* (Ottawa, September 1999).

[282] ICC, *Inquiry into the 1907 Reserve Land Surrender Claim of the Kahkewistahaw First Nation* (Ottawa, February 1997), (1998) 8 ICCP 3 at 76.

[283] Sub nom *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193.

> The Court's comments on the question of pre-surrender fiduciary obligation may be divided into those touching on the *context* of the surrender and those concerning the substantive *result* of the surrender. The former concern whether the context and process involved in obtaining the surrender allowed the Band to consent properly to the surrender under section 49(1) and whether its understanding of the dealings was adequate. In the following analysis, we will first address whether the Crown's dealings with the Band were "tainted" and, if so, whether the Band's understanding and consent were affected. We will then consider whether the Band effectively ceded or abnegated its autonomy and decision-making power to or in favour of the Crown.
>
> The substantive aspects of the Supreme Court's comments relate to whether, given the facts and results of the surrender itself, the Governor in Council ought to have withheld its consent to the surrender under section 49(4) because the surrender transaction was foolish, improvident, or otherwise exploitative.[284]

As a result, it can be seen that the Court has established at least four distinct benchmarks by which Canada's conduct in the exercise of its pre-surrender fiduciary obligations will be measured: where a Band's understanding of the terms of the surrender is inadequate; where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the Band's understanding and intention; where the Band has abnegated its decision-making authority in favour of the Crown; and where the surrender is so foolish or improvident that it must be considered exploitative.

In the application of the foregoing principles to the facts of this inquiry, we must also consider the question of the onus of proof. We have stated that, in accordance with the Specific Claims policy, the claimant bears the onus of establishing that Canada breached its lawful obligation in taking a surrender from the Band in 1909. This position is consistent with the "guiding principle" referred to in the majority and minority judgments in *Apsassin*, mandating that the decisions of aboriginal people with respect to the surrender of their lands be respected and honoured.[285] Notwithstanding the above, however, McLachlin J (as she then was) pointed out that the trial judge was correct in his view that a fiduciary involved in a conflict of interest "bears the onus of demonstrating that its personal interest did not benefit from its fiduciary power.[286]

---

[284] ICC, *Inquiry into the 1909 Reserve Land Surrender Claim of the Moosomin First Nation* (Ottawa, March 1997), (1998) 8 ICCP 101 at 182–83.

[285] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 358 (SCR) [majority], 371 [minority].

The trial judge, Addy J, had drawn an analogy based on the fiduciary relationship between the Crown and a band, on the one hand, and, on the other, the various "special" or "confidential" relationships that the law of contract recognizes as giving rise to a presumption that the stronger party has exerted influence over the weaker. In the above situation, the law will require the stronger party to bear the onus of rebutting the presumption of undue influence.

In the context of a challenge to the validity of a surrender, however, Addy J stated:

> Finally, even where there exists a special relationship between the parties, when an agreement in writing is being challenged and especially an indenture under seal such as the present one, it seems that there would have to be something more than a bare allegation of improper conduct before there is any duty on the person in the dominant position to adduce evidence to establish that the special duty was properly fulfilled.[287]

Undoubtedly, the circumstances of each case will determine whether the above presumption arises, and, as a consequence, whether the onus has been shifted to Canada to rebut the allegation that it improperly exerted influence to obtain the surrender. Justice McLachlin's judgment in ***Apsassin,*** however, appears to indicate that, in circumstances where Canada faces conflicting political pressures in the form of preserving the land for the band, on the one hand, and, on the other, making it available for sale to other parties, Canada bears the onus of demonstrating that it did not breach its fiduciary duty to the band.[288]

Finally, we are mindful that the above principles regarding the onus of proof, which were developed by the courts to provide equitable relief in circumstances where it would be unfair to allow an agreement to stand, are subject to certain bars to relief. One circumstance in which the courts will decline to grant relief to a weaker party, despite the fact that undue influence has been alleged or presumed, is where that party has affirmed the transaction, once the possibility for undue influence has ended.[289] In other words, the presumption may be rebutted by the weaker party's acquiescence after the fact.

---

[286] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 379 (SCR).

[287] *Apsassin v. Canada (Department of Indian Affairs and Northern Development),* [1988] 3 FC 20 at 65.

[288] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development),* [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 379 (SCR), McLachlin J.

A discussion of the application of the above principles to the facts of this case follows.

Inadequate Understanding

In his judgment for the majority in the *Apsassin* case, Justice Gonthier wrote that he would have been "reluctant to give effect to this surrender variation if [he] thought that the Band's understanding of its terms had been inadequate, or if the conduct of the Crown had somehow tainted the dealings in a manner which made it unsafe to rely on the Band's understanding and intention."[290]

The Key First Nation submits that an *adequate* understanding of the terms of a surrender, within the meaning contemplated by the Supreme Court in *Apsassin*, requires that a band give its *informed* consent to the surrender.[291] Based on the evidence in this case, counsel contends that The Key Band clearly could not have expressed any informed consent to the 1909 surrender. First, he says that there is no evidence that the department ever explained to The Key Band all the relevant facts surrounding the surrender, or any of the other options available to it as an alternative to surrender, before the May 18, 1909, vote.[292] Counsel has listed some of the information that he feels ought to have been provided to the Band:

> ... the effect of a surrender; the option to give the surrender, or not to give the surrender, material background facts to the surrender, or legal advice; any technical advice about the agricultural or economic benefits or drawbacks of a surrender; that they were giving up their rights to the Indian reserve lands forever; that a surrender of the sort in question was permanent and irrevocable; the short or long term implications of a surrender; whether or not a surrender was in the best interests of the Band; the nature of the proposed surrender, its gravity, any material risks and any special or unusual risks; what the risks were in proceeding with a surrender or what the risks were in not proceeding with the surrender; whether it was more in the interests of the Band to seek an exchange of land; what the other options were for acquiring farm equipment (i.e. to lease some land to acquire any necessary funds as a means of generating money to be used to assist the band or to purchase farm equipment, rather

---

[289] S.M. Waddams, *The Law of Contract*, 4th ed. (Toronto: Canada Law Book, 1999), paragraph 552, citing *McCarthy v. Kenny*, [1939] 3 DLR 556 (Ont. SC).

[290] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 362 (SCC), Gonthier J.

[291] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 209.

[292] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 217.

> than surrendering and selling the land); that the surrender was for the benefit of others; that the government was interested in taking the surrender to acquire Indian reserve land for non-Aboriginal settlement and not for the benefit of the Band; that the department may not have been able to get a good price for the land; or that Graham himself considered that the department should supply any farm equipment that the Band needed.[293]

In further support of his contention that the Band's understanding of the surrender and its consequences was inadequate, counsel points to the lack of any evidence that the surrender document was ever explained to the Band as a whole, or that the affidavit of May 19, 1909, was ever explained to Chief The Key.[294]

Furthermore, the Band points to the significance of the absence of an interpreter at the surrender meeting and the fact that Chief The Key marked the surrender affidavit on that occasion, especially since some band members, including Chief The Key, did not speak English. According to counsel for the First Nation, the fact that some band members in 1909 may have been able to speak some English does not imply that they could have adequately understood or translated the technical legal terms of a surrender document.[295] In this context, counsel submits that there was an additional obligation on the representatives of the department to ensure that the Band received independent legal advice concerning the effect of a surrender.[296]

Finally, the First Nation takes the position that The Key Band's participation in surrender discussions in 1903 does not imply that it had an adequate understanding of the 1909 surrender. In counsel's view, the fundamental nature of each of the two events was completely different, since the first surrender contemplated a land exchange, whereas the latter concerned a surrender for sale.[297]

Not surprisingly, Canada takes the position that The Key Band appreciated the nature and consequences of the 1909 surrender, in that its members understood that they were giving up forever all rights to the surrendered land.[298]

In Canada's view, the most persuasive evidence in support of the position that the Band's understanding was adequate is found in three facts: first, surrenders had been discussed with the Band since 1902–03; second, Chief The Key understood that a surrender involved a "taking" of reserve land; and, third, this knowledge formed the basis of the Chief's initial opposition to the 1903 proposal.[299] Counsel for Canada also states that the failure to provide an interpreter did not constitute a breach of its fiduciary obligation, since the evidence indicates that band member George Brass (who was in attendance at the surrender meeting) was a noted interpreter for the Band.[300]

---

[293] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 222–23.

[294] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 222.

[295] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 223–25.

[296] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 226.

[297] Reply Submissions on Behalf of The Key First Nation, June 8, 1999, pp. 36–38.

[298] Submission on Behalf of the Government of Canada, May 27, 1999, p. 72.

In our consideration of the above issue, we note that the First Nation's submission emphasizes that The Key Band lacked the information, including independent legal advice, necessary for it to form an *informed* consent to the surrender. Because it was raised and discussed at trial in *Apsassin*, this issue has acquired some significance in the context of the discharge of the onus of proof where undue influence had been presumed owing to the existence of a "special relationship."

First, given the remarks of Justice McLachlin in *Apsassin* concerning the effect of conflicting political pressures on the Crown, it appears that Canada in this case bears the onus of establishing that it did not exert undue influence on the Band to obtain the surrender, and that the Band's understanding of the nature and effect of the surrender was adequate. The record in this inquiry clearly establishes that, at the time of the surrender, the government had in place a policy to free up unused Indian lands for non-aboriginal settlement.

The proposition that Canada bears the onus of establishing that the Band's consent to the surrender was "informed" was raised at trial in *Apsassin*. In this context, Justice Addy stated:

> [C]ounsel for the plaintiffs ... went on to state that, in view of the relationship existing between the parties, it was now incumbent upon the defendant to prove positively that some 16 matters ... had been explained to the Band before informed consent could be found to have existed and that, failing the discharge of this burden, the plaintiffs would succeed. In the first place, I totally reject the argument that all these matters had to be explained. Many of them are redundant or irrelevant, others would obviously be known to the Indians, and others would be required only if they were not only dependant persons but actually *non compos mentis*, in which case no consent could validly be obtained. In the second place, it would be manifestly ludicrous to require now, 40 years after the event, when all of the persons who might have given

---

[299] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 72–73.

[300] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 74–75, citing Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 17, 23, 74, 95 (ICC Exhibit 6).

> advice are either deceased or too senile to testify, that the defendant establish positively that advice was given on all these matters.[301]

Given that the events which form the basis for The Key First Nation's claim occurred more than 90 years ago, we adopt the approach articulated by Justice Addy. We do not require that Canada, in order to discharge the burden upon it, establish by positive evidence that advice was given on all the matters referred to earlier by counsel for the First Nation. We are supported in this view by our review of both judgments of the Supreme Court in *Apsassin*, which, while not specifically addressing the foregoing issue, make clear that the burden on Canada is not as onerous as alleged by counsel for the First Nation.

This determination does not dispose of the issue, however. The test articulated by Addy J in *Apsassin*, and approved by Justice Gonthier in the Supreme Court, requires us to determine whether the evidence establishes that the eligible voting members of the Band understood that, by the surrender, they were giving up forever all rights to their reserve.[302] In the recent Duncan's inquiry, we determined that the relevant factors to be examined in the course of the above determination included whether the Band had been aware of the surrender plan for some time before the event, and whether the matter appeared to have been discussed and the terms negotiated before the vote.[303]

In the current inquiry, Canada has adduced evidence that the Band had discussed, and that a majority of its members had voted in favour of, a surrender of the same land in 1903. The earlier proposal had also contemplated a sale of certain portions of the reserve to fund the acquisition of agricultural implements.[304] At that time, Chief The Key voted against the proposal, fearing, according to Agent Carruthers, that "it was the thin edge of the wedge, and that his whole Reserve would ultimately be taken from him."[305] Subsequently, according to the agent, the Chief acknowledged that the plan was for the good of the Band. This change in view indicates to us that Chief The Key, who was still Chief in 1909, understood not only the nature and effect of the proposed 1903 surrender but also its terms, which, with the exception of the exchange portion, were substantially similar to the terms of the surrender at issue in this inquiry.

---

[301] *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20 at 65 (TD).

[302] *Apsassin v. Canada (Department of Indian Affairs and Northern Development)*, [1988] 3 FC 20, 1 CNLR 73 at 129–30 (TD); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 359, Gonthier J.

[303] ICC, *Duncan's First Nation Inquiry Report on: 1928 Surrender Claim* (Ottawa, September 1999), 195.

[304] "Record of Vote," The Key Band, December 13, 1903 (ICC Documents, p. 357).

[305] H.A. Carruthers to David Laird, March 11, 191, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 369–72).

There is also evidence that the Band apparently initiated surrender discussions with Agent Blewett in July 1908, and that the terms of the surrender (in particular the amount of the immediate payment) were renegotiated by the Band during a meeting with Inspector Graham in January 1909.[306] As well, it appears that, in April 1909, members of the Band inquired of the department when the surrender would be taken.[307]

On the basis of the above, we conclude that the Band's understanding of the nature, effect, and terms of the surrender was adequate, and, as a result, we hold that Canada has discharged the burden upon it. In the alternative, we note that band members appeared to affirm the surrender by actions taken long after any undue influence could still have been in existence. These actions include a request made in June 1911 by Chief The Key and the Headmen of the Band for interest payments accruing from the sale proceeds of the surrendered land.[308] As a result, Canada has not breached its fiduciary duty to the Band on this ground.

Tainted Dealings

As discussed earlier in this report, Justice Gonthier, writing for the majority in *Apsassin*, indicated that he would be reluctant to give effect to a surrender if the conduct of the Crown had somehow tainted the dealings in a manner that made it unsafe to rely on the Band's understanding and intention. In this case, The Key First Nation has argued that a number of circumstances surrounding the taking of the surrender amount to "tainted dealings" within the meaning contemplated by Justice Gonthier, and that, as a result, Canada breached the fiduciary duty it owed to the Band.

First and foremost, the First Nation submits that it was not in the best interests of the Band that the land be surrendered and sold. Although the express justifications for the surrender were that the quantity of reserve land was in excess of the Band's needs, and that capital was required to purchase implements, counsel for the First Nation submits that the evidence does not support these reasons.[309] To the contrary, the evidence, in his view, indicates that the Band was self-sufficient, that it was actively engaged in stock raising, and that it was purchasing its own implements.

---

[306] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[307] W.G. Blewett to J.D. McLean, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

[308] A.A. Crawford to Secretary, Department of Indian Affairs, June 28, 1911 (ICC Documents, p. 508).

[309] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 236–38.

The evidence referred to consists of information provided by departmental officials of the day. For example, Agent Blewett's March 1909 report stated that "these Indians have almost all the necessary implements, and are buying all needed from their own resources."[310] Counsel for the First Nation points out that Blewett's report of the following year, which followed the surrender but predated the sale of the surrendered land, was essentially to the same effect.[311] As well, the "Land Sales Research" report,[312] prepared for the Commission in July 1998, appears to indicate that only a fraction of the proceeds generated by the sale of the surrendered lands was actually spent on implements and related expenditures.

Similarly, the notion that the Band had too much land for its own use is contradicted, in the First Nation's view, by evidence such as Agent Jones's warnings of 1895[313] and 1899[314] of anticipated hayland shortages due to the increasing numbers of livestock. Also seen as significant by the First Nation is the department's 1904 advice to Agent Carruthers to the effect that it might not be prudent to surrender the eastern portion of the reserve (as proposed in 1903) because the original surveyor had appeared to believe that the land contained hay swamps useful to stock growers.[315] Moreover, counsel finds it suspicious that Inspector Graham's memorandum of January 1906, stating that the Band had "sufficient land" for its purposes, made no mention of an excess of land, yet in 1908 Graham advised his superiors that a surrender would still leave the Band with more land than it could ever use.[316]

Another factor that the First Nation considers to be evidence of "tainted dealings" within the meaning of *Apsassin* was the 1906 amendment to the

---

[310] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 256, citing W.G. Blewett, "Annual Report," March 3, 1909, Canada, Parliament, *Sessional Papers*, 1910, Department of Indian Affairs, "Annual Report," 1909 (ICC Documents, p. 468).

[311] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 258, citing W.G. Blewett to Frank Pedley, April 11, 1910, Canada, Parliament, *Sessional Papers*, 1911, Department of Indian Affairs, "Annual Report," 1910 (ICC Documents, p. 494).

[312] Public History Inc., "The Key Band 1909 Surrender Land Sales Research," July 1998 (ICC Exhibit 7).

[313] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 266, citing W.E. Jones to DSGIA, March 28, 1895 (ICC Documents, pp. 269–71).

[314] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 267, citing W.E. Jones to Clifford Sifton, August 30, 1899, Canada, Parliament, *Sessional Papers*,1900, No. 9, Department of Indian Affairs, "Annual Report," 1899 (ICC Documents, pp. 300–01).

[315] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 267–68, citing H.A. Carruthers to David Laird, December 21, 1903, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 358–64).

[316] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 270–74, citing W.M. Graham to Secretary, Department of Indian Affairs, January 18, 1906, NA, RG 10, vol. 7770, file 27117-2 (ICC Documents, p. 439); W.M. Graham to Secretary, Department of Indian Affairs, August 13, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 455–56).

Indian Act, which changed the maximum amount of the immediate and direct payment that could be made to band members on a land surrender from 10 to 50 per cent of the purchase price of the land. According to the First Nation, this amendment was openly intended to induce land surrenders in order to facilitate non-aboriginal settlement, a policy reiterated in Deputy Superintendent General Pedley's Annual Report for 1908.[317]

Furthermore, Inspector Graham acknowledged that he had "persuaded" the Band to surrender 17 sections of land instead of the 13 originally contemplated, an action which the First Nation submits is evidence of an attitude that favoured the promotion of surrenders over the best interests of the Band.[318] The First Nation also points out that Graham offered the Band a cash inducement of $100 per capita at the very meeting at which this "persuasion" had taken place. As a result, in the First Nation's view, Canada failed in its duty to properly manage the competing interests of the Band, on the one hand, and, on the other, the promoters of non-aboriginal agricultural settlement.[319]

In summary, the First Nation submits that all the foregoing circumstances "add up to an overwhelming indication that tainted dealings surrounded the purported surrender" of The Key reserve in 1909. As a result, counsel concludes that, in the spirit of Justice Gonthier's remarks in *Apsassin*, it would be unsafe to rely on the apparent intention of the Band at the time.

In contrast, Canada argues that a close examination of all the factors relevant to this issue leads to the conclusion that its conduct did not amount to "tainted dealings" of the type contemplated by Justice Gonthier.

First, counsel for Canada submits that the surrender was initiated by the Band itself in July 1908, in the absence of pressure from any third parties or from Canada. In his view, the evidence indicates that the Band restated its intention to surrender the land to the department in January 1909, and again in April 1909.[320] He points out that there exists no evidence of a "concerted campaign" or "continual barrage" of local and departmental pressure, as was found to exist in the Moosomin and Kahkewistahaw inquiries conducted by this Commission, but only a single request from Dr Cash, the local MP.[321] Significantly, in Canada's view, Deputy Superintendent General Pedley did not pursue the matter with the Band as a result of Dr Cash's letter, but instead disposed of his inquiry in a fairly summary fashion.

---

[317] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 246–48, citing Frank Oliver, June 15, 1906, Canada, House of Commons, *Debates*, 1906, vol. 111 (ICC Documents, pp. 423–30); Frank Pedley in Canada, *Sessional Papers*, 1909, Department of Indian Affairs, "Annual Report," 1908 (ICC Documents, p. 445).

[318] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 249–50, citing W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[319] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 300–01.

[320] Submission on Behalf of the Government of Canada, May 27, 1999, p. 76, citing W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454); W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62); W.G. Blewett to J.D. McLean, April 19, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 469).

Furthermore, Canada states that the surrender vote was not timed or staged to obtain a technical consent from the Band. Counsel points out that the vote took place almost a year after the Band's initial request, and that, at the time of the vote, The Key Band was not poor, starving, or without effective leadership.[322] Counsel also submits that the Band, and not Inspector Graham, initiated the increase in the proposed cash advance (from $80 to $100 per capita) at the pre-surrender meeting in January 1909. As a result, he argues that the cash advance could not have been an improper inducement.[323]

As well, Canada takes the position that Inspector Graham's action in "persuading" the Band to surrender 17 sections instead of the original 13 cannot be considered coercive or an example of undue influence because the actual vote took place four months after the "persuasion" in question. Further, counsel submits that the actions or motivations of Inspector Graham in other surrenders should be considered irrelevant, since the issues in this case should be decided solely on the basis of the facts before the Commission in this inquiry.[324]

Finally, Canada submits that the post-surrender conduct of the Band is consistent with the conclusion that its members truly intended to consent to the surrender. The conduct in question includes a subsequent surrender, the lack of any reported contemporaneous objections, and repeated requests concerning receipt of the proceeds of sale of the surrendered land.[325]

In conclusion, Canada submits that there were no "tainted dealings" surrounding the 1909 surrender such that the Band's understanding and intent were impaired in any way.

In the Kahkewistahaw, Moosomin, and Duncan's inquiries, we looked at the manner in which the Crown managed competing interests to determine whether a breach of the fiduciary duty had occurred. Keeping in mind our earlier comments about the onus of proof, our consideration of this issue will involve a determination of whether Canada has established that it acted honourably and in the best interests of the Band when it obtained the surrender.

---

[321] Submission on Behalf of the Government of Canada, May 27, 1999, p. 75.

[322] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 77–78.

[323] Submission on Behalf of the Government of Canada, May 27, 1999, p. 80, citing W.M. Graham to Frank Pedley, January 21, 1909 (ICC Documents, pp. 460–62).

[324] Submission on Behalf of the Government of Canada, May 27, 1999, p. 79.

[325] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 78–79.

In this inquiry, as in past inquiries, we find instructive the criteria set out by the trial judge in *Apsassin* in his determination that the dealings in that case were *not* tainted. These criteria include whether the Band knew for some time that an absolute surrender was contemplated; whether the matter had been discussed by the Band and officials of the department on several occasions; whether the Band members had discussed the matter among themselves; whether the matter had been fully discussed at the surrender meeting; whether there was evidence that Canada attempted to influence the Band at or before the surrender meeting; whether representatives of the department had explained the consequences of surrender to the Band; and whether the band members understood that, by surrendering, they were forever giving up all rights in their land in exchange for money.

In the matter before us, it is apparent that the evidence does not include any details of the events which took place at the surrender meeting. We note, however, that surrender discussions between the Band and either the agent or Inspector Graham had taken place on at least three occasions over a period of ten months before the actual surrender meeting, and that those discussions were apparently initiated by the Band. We are aware that Inspector Graham reported in January 1909 that he had "persuaded" the Band to surrender 17 sections of land instead of the 13 originally contemplated. At the same meeting, however, it appears that the Band negotiated an increase in the payment to be received immediately after execution of the surrender from $80 to $100 per capita. Such bargaining indicates to us that both parties renegotiated the terms of the surrender to their advantage. In previous inquiries in which the Commission has held that Canada's conduct amounted to "tainted dealings" within the meaning of *Apsassin*, we have at times seen evidence of a concerted and sustained campaign of pressure brought to bear on the Band by departmental officials over a period of years. In the current inquiry, the evidence does not suggest that Canada engaged in such conduct. Rather, it appears that departmental officials dropped the subject of surrender in 1903–04 after the land proposed to be exchanged for the surrendered land was no longer available. Further, unlike the situation in Kahkewistahaw, where pressure was brought to bear on the Band by virtually every figure of authority in the local community over a 22-year period, the evidence before us in this inquiry indicates that the department received only one isolated request concerning the possible surrender of the land, a request that Deputy Superintendent General Pedley disposed of in a summary fashion.

We are aware of the policy of the government of the day to permit surrenders in situations where the department considered that a band was holding land in excess of its needs. This policy, which appeared to be in furtherance of a concurrent policy to encourage non-aboriginal agricultural settlement, arguably placed Canada in a position of conflict of interest of the type contemplated by Justice McLachlin in *Apsassin*. As a result, Canada bears the onus of establishing that it discharged its duty to ensure that its dealings with the Band were conducted honourably. Based on all the foregoing, and especially in the absence of the kind of coercive behaviour referred to above, we conclude that Canada *has* discharged the onus on it to establish that its dealings with the Band were not "tainted" within the meaning of *Apsassin*. As a result, Canada did not breach its fiduciary duty to the Band on this basis.

Cession or Abnegation of Decision-Making Power

The Key First Nation relies on the reasoning of this Commission in the Sumas inquiry[326] (in which we adopted the views of Justice McLachlin in *Apsassin*) that it is necessary to look behind the ostensible consent of the Band to determine whether any unfair advantage has been taken of the Band as a result of its relative vulnerability vis-à-vis the Crown. Applying this test to the facts of the present inquiry, counsel for the First Nation submits that the Band was manipulated into surrendering its land – in effect, ceding its decision-making power to the Crown.[327]

The primary argument offered by the First Nation in support of this allegation concerns the fact that the surrender documents were apparently executed by someone other than the members of the Band. This fact, in conjunction with the absence of any evidence concerning what transpired at the surrender meeting, must lead, in counsel's view, to an inference that "Canada assumed the power of The Key First Nation over whether or not a portion of the Indian reserve of The Key First Nation would be surrendered."[328] According to the First Nation, Canada's representatives were therefore subject to a specific fiduciary duty to act solely in the best interests of the Band, a duty they breached by also considering the interests of non-aboriginal settlers. In this context, the First Nation once again relies on all the foregoing arguments raised in relation to the subject of "tainted dealings."

---

[326] ICC, *Sumas Indian Band: 1919 Surrender of Indian Reserve No. 7 Inquiry* (Ottawa, August 1997), (1998) 8 ICCP 281.

[327] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 331.

[328] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 331–32.

Canada's perspective on this issue is that the evidence does not support the contention that the Band abnegated or entrusted its power of decision over the surrender to the Crown, for several reasons. First, counsel for Canada states that the subject of surrenders had been discussed with this Band for seven years, and that the 1909 surrender had been discussed with it for ten months before the vote. Second, the evidence, in counsel's submission, indicates that The Key Band initiated the surrender discussions and met with various departmental officials on at least three occasions before the vote to discuss the merits and terms of the proposed surrender. Third, Canada relies on its prior arguments regarding "adequate understanding" and "tainted dealings" as support for the submission that the Band understood the consequences of the surrender before the vote, and that Canada did not coerce the Band into executing the surrender. Fourth, Canada submits that the Band had effective leadership at the time of the surrender, as Chief The Key had previously proven himself capable of voting against a surrender that he felt was not in the best interests of the Band. Finally, Canada takes the position that the post-surrender conduct of the Band confirms that the Band intended to surrender its land, since it was interested in obtaining the proceeds of sale.[329] In conclusion, Canada submits that The Key Band did not cede to the Crown its power to consent to the 1909 surrender.

It has generally been acknowledged that the judicial basis for this aspect of the pre-surrender fiduciary duty is to be found in the judgment of McLachlin J in *Apsassin.* In her judgment, she drew on several Supreme Court decisions dealing with the law of fiduciaries in the private law context:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 SCR 99 [[1988] 1 CNLR 152 (abridged version)]; *Norberg v. Wynrib*, [1992] 2 SCR 226; and *Hodgkinson v. Simms*, [1994] 3SCR 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (*or more often finds himself in the situation where someone else has ceded for him*) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power

---

[329] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 90–91.

> is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[330]

In the Kahkewistahaw and Moosomin inquiries, one of the most significant factors causing us to conclude that the bands in those inquiries *had* ceded power of consent to the Crown was the state of the Bands' leadership at the time of surrender. In Kahkewisthaw, we found that surrender proposals had been repeatedly rejected by the Band as long as Chief Kahkewistahaw was alive, but that soon after his death, and at a time when the Band had no strong leader, it reversed its position and consented to the surrender. Similarly, in Moosomin, we held that the vacuum in the Band's leadership at the time of the surrender contributed significantly to the cession or abnegation of its decision-making power in granting consent to the surrender of *its* reserve lands. The facts of the present inquiry differ significantly from the above, in that Chief The Key, who had voted against the 1903 surrender proposal reportedly on the basis that he thought it would lead to the whole reserve being "taken" from him,[331] was still Chief of the Band at the time of the 1909 surrender. As a result, we see no evidence that The Key Band was powerless at the relevant time in the way that characterized the bands in the earlier inquiries.

Similarly, we see no evidence of persistent attempts on the part of departmental officials to secure a surrender despite all obstacles, nor any evidence that the members of the Band were in any way resigned to the inevitability of the event. Rather, the evidence indicates that band members initiated surrender discussions; that they renegotiated one of its terms in their favour; that they made inquiries of the agent as to when the surrender might be expected; and, after the fact, that they took an interest in the receipt of the sale proceeds. As a result, we conclude that The Key Band did not cede or abnegate its decision-making power regarding the surrender to or in favour of the Crown.

Exploitative Bargain

The First Nation submits that the 1909 surrender of a portion of The Key Reserve was "exploitative" within the meaning contemplated by the Supreme Court of Canada in the *Apsassin* case. In the words of Justice McLachlin:

---

[330] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (1995), [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 371–72 (SCR), McLachlin J. Emphasis added.

[331] H.A. Carruthers to David Laird, March 11, 1904, NA, RG 10, vol. 3561, file 82/1 (ICC Documents, pp. 369–72).

> It follows that under the *Indian Act*, the Band had the right to decide whether to surrender the reserve, and its decision was to be respected. At the same time, if the Band's decision was foolish or improvident – a decision that constituted exploitation – the Crown could refuse to consent. In short, the Crown's obligation was limited to preventing exploitative bargains.[332]

The First Nation takes the position that the surrender in this case was foolish and improvident because it lacked foresight or concern for the future of the Band. In counsel's view, there was no good economic or agricultural reason for the Band to have surrendered the land, since the evidence indicates that it was self-sufficient in cattle raising and that the majority of the surrendered land was either arable or useful for grazing.[333] Counsel further submits that a surrender of some 11,500 acres, amounting to nearly one half of the reserve, would inevitably have a negative impact on the Band's agricultural future, especially since there existed no equivalent lands for which the surrendered land could be exchanged. As a result, the First Nation concludes that the surrender can only be considered exploitative, especially since departmental officials had consistently taken the view that the Band's future agricultural prospects were promising. Therefore, in the First Nation's opinion, the Governor in Council was subject to a fiduciary obligation to refuse to consent to the surrender.[334]

For its part, Canada takes the position that the surrender was not "exploitative," as that term has been defined by the Supreme Court, but rather was "entirely reasonable when viewed from the perspective of the Band at the time." Counsel for Canada frames the test in the following terms:

> Can it be said, at the time and from the Band's perspective, that the surrender made some sense?[335]

To answer this question, counsel submits that a number of factors must be reviewed: the use of the land prior to surrender; the quantity and quality of the remaining land in the context of the Band's perceived needs and interests; the demographics of the Band; the views of contemporary officials; the Band's existing and contemplated way of life; and the potential benefits associated with the surrender.

---

[332] *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, [1996] 2 CNLR 25, 130 DLR (4th) 193 at 370–71 (SCC).

[333] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, pp. 323–24.

[334] Submission on Behalf of The Key First Nation, April 20, 1999, vol. 2, p. 328.

[335] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 81– 82.

Applying these factors to the evidence presented in this case, Canada submits that the surrender was not exploitative. First, counsel points out that the quantity of land remaining after the surrender significantly exceeded the treaty land entitlement of the band members resident on it, since the Shoal River Indians never followed Chief Key to the new reserve.[336] Second, Canada relies on the report of Serecon Valuation and Agricultural Consulting Inc., prepared at the request of the Commission, to the effect that the surrender did not reduce the productive capacity of the reserve on a per acre basis. In other words, the surrender did not have the effect of taking only the best land.[337]

In addition, counsel for Canada submits that, on the evidence, the surrendered lands were not used by the Band for economic or residential purposes before the surrender. In support of this argument, he cites a local history of the Band which indicates that the majority of the Band had moved to the centre of the reserve by 1908.[338] Further, Agent Blewett's report of July 24, 1908, indicated that the proposed surrender would not cut off any buildings or improvements;[339] similarly, Inspector Graham's report on the pre-surrender meeting advised that the land in question was not being used.[340]

Counsel further states that, although the Band was beginning to make steady agricultural progress in the years leading up to the surrender, its predominant economic activities at that time were hunting and freighting. As a result, there may not have been a pressing need for implements in 1904, when Inspector Graham reported that the department would furnish enough for the Band's needs. In the years that followed, however, the evidence indicates the development of a gradual trend towards farming as a way of life.[341] In Canada's submission, the Band would then have required capital to acquire additional implements. Confirmation that further equipment was required and purchased to meet the Band's expanding farming activities can be found, according to counsel, in the annual reports from 1910 through 1913.[342]

---

[336] Submission on Behalf of the Government of Canada, May 27, 1999, pp. 82–83.

[337] Submission on Behalf of the Government of Canada, May 27, 1999, p. 84, citing Serecon Valuation and Agricultural Consulting Inc. to Indian Claims Commission, November 25, 1998, 2 (ICC Exhibit 10A).

[338] Rev. Harry B. Miller, *These Too Were Pioneers: The Story of The Key Indian Reserve No. 65 and the Centennial of the Church, 1884–1984* (Melville, Sask.: Seniors Consulting Service, 1984), 38 (ICC Exhibit 6).

[339] W.G. Blewett to Department of Indian Affairs, July 24, 1908, NA, RG 10, vol. 4039, file 329759 (ICC Documents, p. 454).

[340] W.M. Graham to Frank Pedley, January 21, 1909, NA, RG 10, vol. 4039, file 329759 (ICC Documents, pp. 460–62).

[341] Submission on Behalf of the Government of Canada, May 27, 1999, p. 87, citing W.M. Graham to Frank Pedley, October 3, 1905, Canada, Parliament, *Sessional Papers*, 1906, No. 9, Department of Indian Affairs, "Annual Report," 1905 (ICC Documents, pp. 409–11).

Finally, Canada submits that, after the surrender, The Key Band, comprising 80 to 90 people, was left with more than 8,000 acres of arable land, nearly 2,000 acres of marginally arable land, and almost 5,000 acres of land suitable for pasture.[343] Counsel argues that this quantity was sufficient to provide for the Band's existing and foreseeable needs, with the result that the surrender cannot have been exploitative.

Our decision on this issue is guided by the reasoning of the trial judge in *Apsassin*, which was approved in the Supreme Court of Canada. On the facts in *Apsassin*, Addy J had found that the decision to surrender the reserve made good sense when viewed from the perspective of the Band at the time. In her judgment in *Apsassin*, Justice McLachlin concurred, reasoning that a band's decision to surrender its reserve was to be respected, unless its decision was so foolish and improvident that it constituted exploitation. If the decision was exploitative, however, the Governor in Council, acting pursuant to the surrender provisions of the *Indian Act*, was obliged to withhold its consent.

In our prior inquiries into the surrenders of the Kahkewistahaw and Moosomin reserves, we adopted the notion that the determination whether the bargain was exploitative was to be made from the perspective of the band at the time of surrender. Furthermore, in the Duncan's inquiry, we held that even if the decision to surrender would today be considered misguided, the Crown would not be guilty of a breach of its fiduciary duty under this heading if, *at the time*, it acted honestly and in what it perceived to be the Band's best interests.

In all the above three inquiries, the determination of this issue largely revolved around the impact of the surrender on the respective bands' way of life and, in particular, on their ability to make a living from agriculture: For example, in Kahkewistahaw, we held that the surrender was exploitative since it had the effect of taking 90 per cent of the arable land located within the reserve. In Moosomin, the Band surrendered its entire reserve of prime farming land in exchange for land of inferior quality elsewhere, a transaction that, in our view, was clearly foolish and improvident. In the Duncan's inquiry, however, after asking ourselves whether the land remaining after the surrender would be sufficient to satisfy the Band's existing and foreseeable agricultural needs, we concluded that the surrender could not be considered exploitative in the context of the time.

---

[342] Submission on Behalf of the Government of Canada, May 27, 1999, p. 88, citing W.G. Blewett to Frank Pedley, April 11, 1910, Canada, Parliament, *Sessional Papers*, 1911, Department of Indian Affairs, "Annual Report," 1910 (ICC Documents, p. 494); Public History Inc., "The Key Band 1909 Surrender Land Sales Research," July 1998, vol. 1, table 3, pp. 35, 37, 38 (ICC Exhibit 7).

[343] Submission on Behalf of the Government of Canada, May 27, 1999, p. 88, citing Serecon Valuation and Agricultural Consulting Inc., *An Historic Agronomic Valuation of Indian Reserve Lands: Key Indian Reserve No. 65, Saskatchewan* (September 1998).

It appears that the issue of whether The Key surrender constituted an "exploitative bargain" within the meaning of ***Apsassin*** will likewise be determined by reference to the economic activities of the Band and the quality and quantity of reserve land surrendered. The evidence in this inquiry indicates that the surrender took nearly one half of the land comprising the reserve, and that all the surrendered land was arable or suitable for grazing. The evidence also indicates that, after 1900, there was a gradual shift in the Band's economic activities from hunting and freighting to agriculture, especially among its younger members. The land remaining in the reserve after the surrender was more or less equal in quality to the land that had been surrendered, according to an expert's report. It is also apparent that the Band, numbering some 80 to 90 individuals, was cultivating approximately 100 acres of land at the time of the surrender, and that, after the surrender, some 8,000 acres of arable land, plus more than 5,000 acres of grazing land, remained in its control. This reasoning is not meant to convey any suggestion that the Crown may justify a surrender by the mere fact that the land remaining in a reserve after the surrender is sufficient to fulfil, or in fact exceeds, the Band's treaty land entitlement. From the perspective of the Band at the time, however, and in light of the fact that the Band itself apparently initiated surrender discussions with representatives of the department, we conclude that this surrender cannot be considered "exploitative" within the meaning contemplated by the Supreme Court in ***Apsassin***.

PART V

CONCLUSIONS AND RECOMMENDATION

The Commission has been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to The Key First Nation. We have concluded that it does not.

First, we have concluded that there is no evidence in this inquiry that the terms of Treaty 4 should be interpreted to include notions of the Band's traditional clan governance. As a result, we hold that there is no evidence of a conflict between the treaty and the surrender provisions of the *Indian Act*, as there is no evidence before us that the parties at the time of treaty intended to establish within its terms a particular standard or threshold of consent.

Second, we find that the Shoal River Indians were not members of The Key Band at the time of the surrender, owing to the mutual intention of the Shoal River Indians, on the one hand, and of the followers of Chief The Key, on the other, to live as autonomous bands. In the alternative, we find that the Shoal River Indians did not habitually reside on or near, or were interested in, IR 65 at the time of the surrender, with the result that they were not eligible to vote pursuant to section 49(2) of the *Indian Act*.

Finally, we find that, in the 1909 surrender of IR 65, the procedural requirements of section 49 of the *Indian Act* were satisfied, and it does not appear to us that the Crown breached any fiduciary obligations to the Band in the course of the surrender proceedings. Specifically, we see no evidence that the Band's understanding of the terms of the surrender was inadequate, that the conduct of the Crown tainted the dealings in a manner that would make it unsafe to rely on the Band's understanding and intention, that the Band ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or that the surrender was so foolish or improvident as to be considered exploitative.

In conclusion, we therefore recommend to the parties:

That the claim of The Key First Nation regarding the surrender of a portion of IR 65 not be accepted for negotiation under Canada's Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Roger Augustine

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

Roger J. Augustine
Commissioner

Dated this 27th day of March, 2000.

APPENDIX A

THE KEY FIRST NATION 1909 SURRENDER INQUIRY

1 **Planning conferences** September 12, 1995
June 9, 1997

2 **Community sessions**

Three community sessions were held.

1st community session: The Key First Nation, Community Centre, January 24, 1996

The Commission heard evidence from Chief O'Soup, Raymond Brass, Susan Brass, Clarice Brass, Sterling Brass, Edwin Crane, Charles Cochrane, and Norman Audy.

2nd community session: The Key First Nation, Community Centre, November 20, 1997.

The Commission heard evidence from Chief Campbell Papequash, Charles Cochrane, Edwin Crane, Miles Musqua, Helen Stevenson, Greg Brass, and Sterling Brass.

3rd community session: The Key First Nation, Community Centre, March 10, 1998

The Commission heard evidence from Chief William Papequash, William Papequash, Dorothy Crow, Emily Durocher, Desmond Key, Auntie Helen, Darrell Papequash, Helen Stevenson, Ronald Gordon, Darrell Cote, Harold Papequash, Sterling Brass, Susan Brass, Charles Cochrane, and Fred Brass.

3 **Expert session** Regina, Saskatchewan, January 25, 1999

The Commission heard evidence from Guy Magny.

4 **Legal argument** Saskatoon, Saskatchewan, June 14, 1999

5 Content of formal record

The formal record for The Key First Nation 1909 Surrender Inquiry consists of the following materials:

- the documentary record (3 volumes of documents)
- 16 exhibits tendered during the inquiry (including 4 volumes of transcripts of the community and expert sessions)
- written submissions of counsel for Canada and written submissions and rebuttal submissions of counsel for the Key First Nation, including authorities submitted by counsel with their written submissions and transcript of oral submission.

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

WALPOLE ISLAND FIRST NATION INQUIRY
BOBLO ISLAND CLAIM

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Roger J. Augustine

COUNSEL

For the Walpole Island First Nation
Russel Raikes

For the Government of Canada
Robert Winogron

To the Indian Claims Commission
David E. Osborn, QC / Ralph Keesickquayash

MARCH 2000

CONTENTS

EXECUTIVE SUMMARY 121

PART I ***INTRODUCTION*** 129
Background to the Inquiry 129
Mandate of the Commission 131

PART II ***HISTORICAL BACKGROUND*** 134
Early Contacts 134
  Map 1: General Map of Region 136
  Map 2: Map of Claim Area 137
Policy Regarding Aboriginal Lands 139
The *Royal Proclamation of 1763* 141
Land Grants to Schieffelin and the Indian Officers, 1783–84 146
  Map 3: Indian Officers' Grant, 1784, and 1786 Surrender 147
The 1786 Surrender 152
The 1790 Treaty 159
Bois Blanc (Boblo) Island after 1790 166

PART III ***ISSUES*** 173

PART IV ***ANALYSIS*** 175
Issue 1: Does the Surrender of May 15, 1786, Contravene the Provisions of the *Royal Proclamation of 1763*? 175
  Applicability of the *Royal Proclamation* 176
  Requirements of the *Royal Proclamation* 179
    Instructions, Licence, or Permission to Obtain a Surrender 181
    General Meeting or Assembly with the Principal Chiefs 183
    Purchase of Lands 184
    Assembly in the Presence of High Officials 187
  Comparison of the 1786 and 1790 Surrenders 187
  Intention of the Parties 187
  Extinguishment 195
Issue 2: (a) Were the Chiefs and Principal Men of the Walpole Island First Nation Signatories to the Alleged Surrender of May 15, 1786? 199

(b) If They Were Not, Does This Make the Surrender Invalid with Respect to the Walpole Island First Nation? 200
Issue 3: Was There Consideration for the Transfer? 200
Issue 4: If There Was Not, Does This Render the Surrender Invalid? 200
Issue 5: (a) Did the Crown and/or Indians Regard the Surrender of 1786 as Invalid When They Entered into the Surrender of 1790? 201
(b) If So, What Is the Effect of the 1790 Surrender on the Alleged Surrender of 1786? 202
Issue 6: Is the Crown Estopped from Relying upon the Surrender of 1786? 202
Issue 7: Did the Crown Breach Its Fiduciary Obligations in Obtaining the Surrender? 204

PART V ***CONCLUSIONS AND RECOMMENDATION*** 205

APPENDIX 207
A Walpole Island First Nation Boblo Island Inquiry 207

EXECUTIVE SUMMARY

BACKGROUND TO THE INQUIRY

In August 1992, the Walpole Island First Nation submitted a specific claim to the Department of Indian and Northern Affairs in relation to the First Nation's claim to Boblo (formerly known as Bois Blanc) Island, an island in the Detroit River. The Walpole Island First Nation alleged, among other things, that Surrender 116, dated May 15, 1786, had breached the terms of the *Royal Proclamation of 1763* and that the surrender was made without compensation to the Walpole Island First Nation. On March 31, 1995, Canada rejected the claim.

Both Walpole Island and Boblo Island are located in southwestern Ontario – Walpole at the confluence of Lake St Clair and the St Clair River; Boblo in the Detroit River near the entrance to Lake Erie.

Four Indian tribes in the region formed a Lake Confederacy – the Huron, Ottawa, Chippewa, and Potawatomi. There is little information, however, as to which of these groups occupied Boblo Island. In 1721, a Jesuit priest, Pierre-François-Xavier Charlevoix, described his trip to the area. He noted that he "spent the night above a beautiful island called the Island of Bois Blanc," but did not mention meeting any Indians there. In 1742, the Jesuits removed most of the Huron from a mission near Fort Detroit and settled them on Bois Blanc Island and the adjacent mainland on the east side of the river. A 1747 manuscript lists 534 persons, plus an unknown number of children, in the "Huron village of the Island of Bois Blancs." The mission was abandoned in 1748 and moved across the river from Fort Detroit.

POLICY REGARDING ABORIGINAL LANDS

On October 7, 1763, King George III issued the *Royal Proclamation*. The Detroit River/Lake St Clair region is well within the vast area reserved by the *Proclamation* for Indian use. According to the *Proclamation*, aboriginal peoples in the area possessed aboriginal title to their lands which could only be extinguished by negotiation with the Crown.

When lands were required, and when an Indian group was willing to sell its land, Crown representatives were to meet the concerned Indians in a public meeting to make the purchase for and in the name of the Crown. This land purchase policy was stressed in instructions sent to Governor James Murray in December 1763. However, in direct contravention of the *Proclamation*, private land sales between British subjects and some of the Chiefs took place in the Detroit area. In 1771, General Thomas Gage, Commander-in-Chief of the British forces at New York, wrote to the commander at Detroit stating that all previous grants were to be voided, since the sales were made without the King's permission and authority.

LAND GRANTS TO SCHIEFFELIN AND THE INDIAN OFFICERS, 1783–84

Early in 1783, two officers, Captains William Caldwell and Matthew Elliott, along with Captain Henry Bird and Deputy Indian Agent Alexander McKee, were negotiating with the local Huron for a "deed" to a seven-mile block of land along the Detroit River across from Bois Blanc Island. Before they could conclude that transaction, however, Lieutenant Jacob Schieffelin, Secretary of the Indian Department at Detroit, obtained deeds for the land from some Ottawa, Chippewa, and Potawatomi Chiefs. Only the deed to the Ottawa was registered and survives. According to the terms of this deed, seven "Principal Village Chiefs and War Chiefs of the Ottawa Nation residing near Detroit" granted Schieffelin a "tract or parcel of Land of seven miles in front and seven miles in depth on the south side of the Detroit River, opposite the Isle au Bois blanc." The grant was made "in consideration of our affection and esteem" for Schieffelin and specified no payment in money or goods.

McKee and Bird wrote letters of complaint as soon as they heard rumours of the transaction. Within a week, Chiefs of the local Ottawa, Chippewa, and Huron began a series of four councils with McKee and others to accuse Schieffelin of deceit and to plead for the return of the deed.

Governor Frederick Haldimand wrote to Lieutenant Governor Jehu Hay of Detroit on April 26, 1784, denying Schieffelin's claim and, at the same time, emphasizing the impropriety of all such grants to individuals rather than the Crown. However, Haldimand did not rule out consideration of the application made by Caldwell and the others to these same lands. On June 8, 1784, the Indian officers received a grant to the seven-mile-square block, plus a larger area adjacent to it. The second grant was made by Ottawa Chiefs and names the grantees as Alexander McKee, William Caldwell, Matthew Elliott, and Thomas McKee.

Caldwell renewed the officers' settlement application to Governor Haldimand, stating that "the Indians are equally desirous with them for the speedy and effectual settling of the same as well as from a political view as on account of the Regard they bear them, having so long served in the field together." Haldimand admitted that he could not confirm the "gift" until there was a proper surrender, but gave his permission for the officers to settle on and improve their lots. He directed McKee to explain to the Indians the steps required to effect a legal grant of land.

The lots for the officers and others were surveyed the following year by Deputy Surveyor Philip Fry, who described them as granted by the "Indians to the Loyalists." Fry had been ordered by Hay to set out four lots of six acres each for Bird, McKee, Caldwell, and Elliott, but discovered that they had by then occupied 10 acres each, "the whole space opposite to the Isle Bois Blanc."

THE 1786 SURRENDER

Despite his superior's clearly stated rules and his own admonition to Schieffelin that purchases from Indians were to be taken from the proper Chiefs, in public, Deputy Indian Agent Alexander McKee obtained a surrender in the name of the Crown on May 15, 1786, from Chippewa and Ottawa Chiefs of both Bois Blanc Island and a seven-mile-square block across the channel, immediately north of the Indian officers' grant. Research conducted on behalf of both parties concluded that none of the signatories to the 1786 surrender could be specifically linked to the Walpole Island First Nation. Extensive research conducted over a number of years on behalf of both Canada and the First Nation failed to produce the documents usually associated with a purchase of land from the Indians.

In 1788, District Land Boards were established to receive and report on applications for land from settlers. McKee was a member of the Land Board of Hesse from its inception. In June 1789, the Governor, Guy Carleton, Baron Dorchester, instructed the Board to immediately establish a settlement, to be called George Town, at a location directly opposite Bois Blanc Island. On August 14, 1789, the Board reported that McKee had informed it that the particular location required for a town site had never been surrendered by the Indians, except for the area covered by the 1784 grant to the Indian officers.

On August 28, 1789, board members reported that it was impossible for them to comply with the general instructions for locating settlers because, according to information given to them by McKee, *none* of the lands in the District of Hesse has been surrendered to the Crown. The Governor wrote to the Superintendent of Indian Affairs, Sir John Johnson, shortly after and clearly stated that previous purchases or grants from the Indians by individuals were totally void.

At some point before the end of 1789, McKee submitted his deed to the lands included in the 1786 surrender and an accompanying memorial directly to Governor Dorchester, instead of to the Land Board. On January 21, 1790, Dorchester's secretary forwarded the deed and memorial to the Land Board for its consideration, while at the same time stating the Governor's opinion that the June 1784 deed presented the only equitable claim on lands in Hesse.

McKee's memorial to Dorchester has not been found. It seems to have referred to McKee's desire to use the lands not for himself but for those Loyalists he deemed worthy. McKee relinquished his interest in or claim to the land in a letter to Sir John Johnson on May 25, 1790, stating that the surrender was made to him to ensure that the Huron were protected from encroachments by others. In an undated memo (possibly written in the summer of 1790), Major Patrick Murray, the Commanding Officer at Detroit, echoed McKee's interpretation of the events surrounding the May 1786 agreement.

The Land Council at Quebec conducted an investigation in 1830 into Indian ownership of lands along the Detroit River. The Council questioned the exclusion of the Huron and Potawatomi who were occupying the area at the time from consent to the 1786 deed. As well, it noted that McKee's declaration that the lands were to be protected for the Huron was "not very easy to be reconciled with the terms of the Deed, or with his own subsequent application to Lord Dorchester and to the Land Board."

THE 1790 TREATY

As soon as Governor Dorchester learned that settlement in the District of Hesse was impeded because the Indians still owned the land, he began the process to purchase the area. On August 17, 1789, he instructed the Superintendent of Indian Affairs, Sir John Johnson, to direct McKee to take a treaty with the Indians in the District of Hesse to obtain the tract needed for settlement. On December 7, 1789, the Board recommended that McKee obtain a cession of a tract "bounded by the waters of the River and Lake St. Clare [sic], Detroit [River] and Lake Erie."

McKee obtained the surrender on May 19, 1790. Minutes of the council with the Indians for that day, as well as journal entries, indicate that the negotiations towards the surrender took place over a number of weeks. Attending for the government on the day of surrender were the Commanding Officer of the fort, as well as Alexander McKee, 14 named army and navy officers, and an unknown number of officers of the militia, magistrates, and general citizens. The acting clerk recorded the session. The Indians were represented by 35 Chiefs. Of those, three of the Chippewa Chiefs and one of the Ottawa Chiefs had also signed the 1786 deed/surrender. Research conducted for the parties concluded that the 1790 signatories represented Thames River, Pelee Island/Anderdon, Walpole Island, St Clair River, and Bear Creek (Sydenham River) regional bands in what is now southwestern Ontario, as well as bands in what is now southeastern Michigan.

Two areas in the ceded tract were reserved for the Indians – a small area near Sandwich and a larger block in the same place at the River Canard described in McKee's 1786 deed, which was reserved for the Huron and other Indians. Bois Blanc Island was not included in the surrender. The sale price of the tract was £1,200 Quebec currency, provided in "valuable wares and merchandise" such as blankets, strouds, cloth, hats, knives, rifles, powder, shot, and other items.

McKee reported to the Land Board of Hesse on May 21, 1790, that he had successfully obtained the cession of land except for two areas to be reserved for the Indians, one of which was "a tract beginning at the Indian officers Land running up the Streight to the French settlement and seven miles in depth." Some members of the Board objected to the reservation of lands, which they believed had been surrendered on May 15, 1786. When the subject was discussed by the Board on May 28, 1790, two members, Major Patrick Murray and Alexander Grant, disagreed with this view and expressed concern that the Board was giving opinions to the Governor on matters relating to Indian affairs.

It is important to note that much of the same land purportedly surrendered in 1786 (the mainland tract) was in fact reserved for the Huron and other Indians in 1790.

ISSUES

The parties agreed that the primary issue to resolve was whether the surrender of May 15, 1786, contravened the provisions of the *Royal Proclamation of 1763*. Other issues, such as whether there was consideration for the surrender, were subsumed under this larger issue. These secondary issues included whether the Walpole Island First Nation was a signatory to the May 15, 1786, surrender; what the effect of the 1790 surrender was on the alleged surrender of 1786; whether the Crown is estopped from relying on the surrender of 1786; and whether the Crown breached its fiduciary obligations in obtaining the surrender.

The parties agreed that, if the surrender were found to be invalid, it would result in a finding of unextinguished aboriginal title.

ANALYSIS

To determine the validity of the 1786 surrender requires, first, an assessment of whether the provisions of the *Royal Proclamation of 1763* were complied with. Although Canada has argued that the *Royal Proclamation* does not apply to this area, there is ample authority to the contrary, including the geographic terms of the *Proclamation* itself.

Table 1 sets out the requirements of the *Proclamation* and compares the 1786 surrender (which is in question in these proceedings) with the 1790 surrender (which is considered valid by the parties) in terms of whether these requirements were complied with in 1786.

McKee had no authority in 1786 to take a surrender; no consideration passed in the form of gifts or other compensation; and the formalities of a surrender, in terms of a public meeting with representatives present from every tribe with an interest in the land, were not complied with. The provisions of the *Royal Proclamation of 1763*, then, were not complied with. However, to determine whether this noncompliance is sufficient to invalidate the surrender requires further consideration of what the parties intended.

The evidence as to what McKee intended is unclear. He had no authority to take a surrender. However, his comments to the effect that the lands were to be reserved for the Huron in 1786 are inconsistent with the terms of the surrender itself, which is unconditional. As well, his application for the transfer of the lands into his own name four years later is troubling. For that reason alone, we rejected Canada's alternative argument that the surrender reflected the Sovereign's "clear and plain" intention to extinguish any aboriginal interest in the lands.

TABLE 1

The Surrenders of 1786 and 1790

Royal Proclamation and Crown Policy	1786 Surrender	1790 Surrender
Instructions, permission, or licence required	No evidence that McKee had instructions to obtain a surrender of the lands in question. McKee indicated to the Land Board at Hesse that he had no instructions from Sir John Johnson to purchase Indian lands in the area and that none had been purchased.	Clear direction from Lord Dorchester to McKee to obtain a "clear and complete cession" to the lands in question and to deal with the Indian title.
Governor, Commander in Chief, and/or Superintendent of Indian Affairs to be present	Three Crown witnesses not identified by position, but are clearly not the Governor, Commander in Chief, or Superintendent General of Indian Affairs.	Major Murray, the Commanding Officer at Detroit, is named as being present and as having verified the items and goods provided as consideration.
Lands to be purchased or sold	No presents or money changed hands: McKee advised Land Board at Hesse that no lands were purchased.	Presents amounting to £1,200 exchanged and verified by list attached to the treaty document.
All Nations with an interest to be present at a public meeting in the presence of the Governor, Commander in Chief, or Superintendent of Indian Affairs	Only nine principal village Chiefs and war Chiefs of the Ottawa and Chippewa Nations involved; no evidence of public assembly; Governor, Commander in Chief, and Superintendent not present	Thirty-five principal village and war Chiefs of the Ottawa, Chippewa, Huron, and Potawatomi Nations involved; Council held for the purpose; not known if Governor, Commander in Chief, or Superintendent present.

It is apparent from the statements made by McKee and Murray that, whatever McKee's intention may have been, the aboriginal parties to the transaction in 1786 intended to reserve lands. As such, the surrender not only fails to comply with the formalities of the *Royal Proclamation*, but also fails to accord with the Crown's policy that lands must be voluntarily ceded. The surrender is therefore invalid.

As well, the 1790 surrender is necessarily inconsistent with the 1786 surrender and may be interpreted as revoking it, in that it reserves the mainland lands which were supposedly surrendered in 1786. There is no basis on which to draw a distinction between the mainland and the island in terms of the 1786 "surrender," since both were dealt with together. The 1790 surrender did not include the island, so whatever aboriginal title was held to the island in 1786 continues to this day.

The question of whether the ancestors of the Walpole Island First Nation were signatories to the 1786 surrender is somewhat academic, since the surrender is not valid with respect to anyone. However, although evidence of who signed the surrender is not complete, it is sufficient to determine that the ancestors of the Walpole Island First Nation probably did not sign it. By contrast, they were present in 1790.

On the issue of whether the Crown is estopped from relying on the surrender, in light of the representations of McKee that the surrender he obtained in 1786 was intended to reserve lands for the use of the Huron, the Crown would be estopped from relying on the surrender document as reflecting an intention to surrender lands.

In light of these findings, it was not necessary to deal with the other issues.

CONCLUSIONS AND RECOMMENDATION

The surrender of May 15, 1786, is invalid on two grounds: it did not comply with the provisions of the *Royal Proclamation of 1763*; and contextual information indicates that the signatories to the surrender understood it would reserve lands, not surrender them. If that conclusion is wrong, we would find that a 1790 surrender, which reserved most of the same lands as those purportedly surrendered in 1786, is necessarily inconsistent with the provisions of the 1786 surrender and therefore revoked it. As a result, the surrender is of no force or effect.

Given that Bois Blanc Island has not been the subject of any other surrenders and was not surrendered in 1790, whatever aboriginal title may have existed to Bois Blanc Island in 1786 continues.

It is therefore recommended that the Walpole Island First Nation resubmit its claim to the federal government under the Comprehensive Claims Policy.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

In August 1992, the Walpole Island First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in relation to the First Nation's claim to Boblo (formerly known as Bois Blanc) Island, an island in the Detroit River. The Walpole Island First Nation alleged, among other things, that Surrender 116, dated May 15, 1786, had breached the terms of the *Royal Proclamation of 1763* and that the surrender was made without compensation to the First Nation.

On March 31, 1995, Canada rejected the claim, advising that members from DIAND and the Department of Justice would be pleased to meet with the First Nation to discuss Canada's preliminary position and further steps to be taken on the specific claims process.[1]

On May 15, 1995, in preparation for a proposed meeting with Canada's representatives, the Walpole Island First Nation made a number of additional allegations relating to Surrender 116. These charges included an allegation that the surrender was fraudulent, in that it had been made without monetary compensation; that the surrender was not valid, as it had not been signed by the Crown and nothing was known about the Indian signatories; and that the island was not surrendered to the Crown, but, rather, had been surrendered in trust for the First Nation.[2]

On November 24, 1995, Canada rejected these additional grounds for the claim, advising that, in its view, "there is no outstanding lawful obligation on the part of the government of Canada owed to the Walpole Island First

---

[1] Letter from Pamela Keating, Research Manager, Specific Claims East/Central, Department of Indian and Northern Affairs Canada, to Chief Joseph B. Gilbert, Walpole Island First Nation, March 31, 1995 (ICC Planning Conference Kit, July 12, 1996, tab 7).

[2] Chief Joseph B. Gilbert, Walpole Island First Nation, to Pamela Keating, Research Manager, Specific Claims East/Central, Department of Indian and Northern Affairs Canada, May 15, 1995 (ICC Planning Conference Kit, July 12, 1996, tab 8).

Nation." Pamela Keating, Research Manager, Specific Claims East/Central, Indian and Northern Affairs Canada, added:

> I should point out that the Walpole Island First Nation has the option to submit a rejected claim to the Indian Specific Claims Commission and request that the Commission hold an inquiry into the reasons for the rejection. Should the First Nation prefer to proceed on that basis, without submitting additional evidence or legal arguments, then this letter will serve as evidence, for the purposes of the Commission, that the Government of Canada could not accept this claim for negotiation under the Specific Claims Policy.[3]

On April 9, 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejection of its claim. On April 26, 1996, the Commission agreed to do so. A planning conference was held on July 12, 1996, at which time the parties agreed to the issues to be reviewed by the Commission. At that time, no challenge was made concerning the Commission's mandate, as the claim had been rejected under Canada's Specific Claims Policy. However, almost two years later, on March 23, 1998, Canada challenged the mandate of the Commission to conduct an inquiry into some of the identified issues. Canada argued that, should it be determined that the claimant was not a signatory to the 1786 surrender, the claim would be based on unextinguished aboriginal title and would therefore fall outside the jurisdiction of the ICC.[4]

The Commission's mandate is to inquire into "only those matters at issue when the dispute was initially submitted to the Commission." A jurisdictional objection of the type raised in 1998 should, in our opinion, have been introduced at the outset, and not two years into the review process. However, we dismiss the objection for the following reasons. The claim, we note, was not rejected by Canada on the basis that the evidence disclosed unextinguished aboriginal title, but, rather, on the basis that the surrender of 1786 was valid. Having rejected the claim on the basis of a valid surrender, Canada was unwilling to take a position on whether the Walpole Island First Nation was or was not a signatory to the surrender. Instead, Canada argued that the ICC lacked jurisdiction to conduct an inquiry should it find that the Walpole Island First Nation was not a signatory.

---

[3] Letter from Pamela Keating, Research Manager, Specific Claims East/Central, Department of Indian and Northern Affairs Canada, to Chief Joseph B. Gilbert, Walpole Island First Nation, November 24, 1995 (ICC Planning Conference Kit, July 12, 1996, tab 9).

[4] Robert Winogron, DIAND, legal counsel, to Russel Raikes, counsel for the Walpole Island First Nation, March 23, 1998 (ICC file 2105-09-03, vol. 2).

Further, so long as Canada asserts that the 1786 surrender is a defence to the Walpole Island First Nation's claim, the claim must necessarily continue within the Specific Claims process. If the Walpole Island First Nation is not a signatory to the surrender, Canada has raised other alternative arguments relating to extinguishment which we must also address. In other words, Canada asserts that, if we make a certain finding after reviewing the evidence, we will be precluded from conducting an inquiry. We find this submission circuitous. Before we can determine the question of whether the Walpole Island First Nation is a signatory or not, however, we must first review the evidence.

Canada's position is really that we lack jurisdiction because, once we review the evidence presented, we *may* find "unextinguished aboriginal title." To reach that conclusion at this stage, we would have to conclude that the Walpole Island First Nation was not a signatory to the document before reviewing any evidence. This matter has been put in dispute by the parties' own submissions. We would also have to ignore Canada's alternative arguments to the effect that aboriginal title was extinguished, in any event, as a result of the surrender. We would prefer to conduct the inquiry without fettering our discretion, and review all the evidence before reaching any conclusions.

We are charged with the responsibility to inquire into Canada's rejection of the claim once requested to do so by the claimant, on the basis of Canada's Specific Claims Policy. Depending on the outcome of our inquiry, we may or may not agree with Canada that the matter involves unextinguished aboriginal title. If we do come to this conclusion, however, it will be a finding that falls within – not outside – our mandate.

A summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

MANDATE OF THE COMMISSION

The mandate of the Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister."[5] The Commission is directed that it may consider "only those matters at issue when the dispute was initially submitted to the Commission," and that it should "inquire into and report on a) whether a claimant has a valid claim for negotiation under that policy where the claim has already been rejected by the Minister; and b) which compensation criteria apply in negotiation of a settlement."[6]

This policy is outlined in the Department's 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims* and states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[7] The term "lawful obligation" is defined in *Outstanding Business* as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e. an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.[8]

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where fraud can be clearly demonstrated.[9]

---

[5] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[6] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[7] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) 20; reprinted in (1994) 1 ICCP 171–85 (hereafter *Outstanding Business*).

[8] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179.

[9] *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 180.

The Commission has been asked to inquire into and report on whether the Walpole Island First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy.

This report contains our findings and recommendation on the merit of this claim.

PART II

HISTORICAL BACKGROUND

EARLY CONTACTS

Both Walpole Island and Boblo Island are located in southwestern Ontario – Walpole at the confluence of Lake St Clair and the St Clair River; Boblo about 40 miles away (by water), in the Detroit River near the entrance to Lake Erie. Boblo is a small island, about two miles long and slightly over 200 acres in area, off the Canadian mainland near the town of Amherstburg in Essex County. Historically, the island was consistently referred to as "Bois Blanc" until about 1898. After that time, it has variously been called "Bob Lo," "Boblo," and "Bois Blanc."[10]

The first written record of European travel to the Lake Erie area is one of the Jesuit missionaries Jean de Brébeuf and Joseph-Marie Chaumonot, who, in the winter of 1640–41, travelled south of their mission to the Huron on Georgian Bay to preach to the Attiouandaron, or Neutral, Nation. Chaumonot reported making a map, but, as it has not survived, it is not known precisely where the priests encountered villages. Some historians assign to the Neutral the entire north shore of Lake Erie between the Niagara and Detroit rivers (a buffer zone between the warring Iroquois[11] and Huron Nations); others argue that their villages were probably centred on both sides of the Niagara River and in a small area at the western end of Lake Ontario.[12] In 1649, the Iroquois destroyed the Huron villages along the shore of Georgian Bay and continued south, eliminating most of the Neutral Nation. The surviving Huron dispersed, some to Quebec, others to islands in Georgian Bay or the northern shores of Lakes Huron and Michigan, and still others as far as Wisconsin. The scattered remnants of the Neutral joined the Huron and ceased to exist as a separate nation. "By 1651 the whole of western Ontario ... was nothing but the unpopulated hunting ground of the Iroquois."[13]

---

[10] The Walpole Island First Nation has used both of the first two spellings, while the 1988/89 official road map for Ontario calls the island "Bois Blanc."

[11] The Iroquois Nation was a confederacy of Mohawk, Oneida, Onondaga, Cayuga, Seneca, and later Tuscarora.

[12] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), xxx.

Few Europeans had been in the area at the time. The British and Dutch were not interested in this area, and the French, who had allied themselves with the Huron and Ottawa (enemies of the Iroquois), avoided the lower Great Lakes area. Early French explorers and missionaries took the more circuitous route westward via the Ottawa River to Lake Nippissing and down the French River to Georgian Bay because the more direct route along the St Lawrence River and Lake Ontario was in Iroquois territory.

In 1666, the Carignan-Salières Regiment destroyed Iroquois strongholds, making it safe for the French to use the more direct route. Four years later, two missionaries from the Seminary of Montreal, François Dollier de Casson and René de Bréhant de Galinée, made their way to Lake Erie and wintered on the north shore near Port Dover: on March 23, 1670, they claimed possession of all the surrounding country (basically southwestern Ontario) in the name of the King of France.[14] These missionaries did not stay in their newly claimed lands, however.

In 1683, a French garrison was sent to Michilimackinac, on the strait between Lake Superior and Lake Michigan, to establish a trading post. By the turn of the century, Antoine Laumet de Lamothe Cadillac, who had been in charge at Michilimackinac from 1694 to 1697, recommended that France should shift the post to Detroit, which not only had a milder climate but was better situated to bar English access to the northwest and maintain French control of the upper Great Lakes. Cadillac wanted the Detroit location to be an agricultural colony, as well as a trading and military post. The King agreed, and Cadillac and his party arrived to begin construction early in 1701.[15] In August of the same year, four years of peace negotiations between the Iroquois and the French, together with their Indian allies, were concluded at Montreal, allowing the French to trade from Fort Detroit in relative safety.

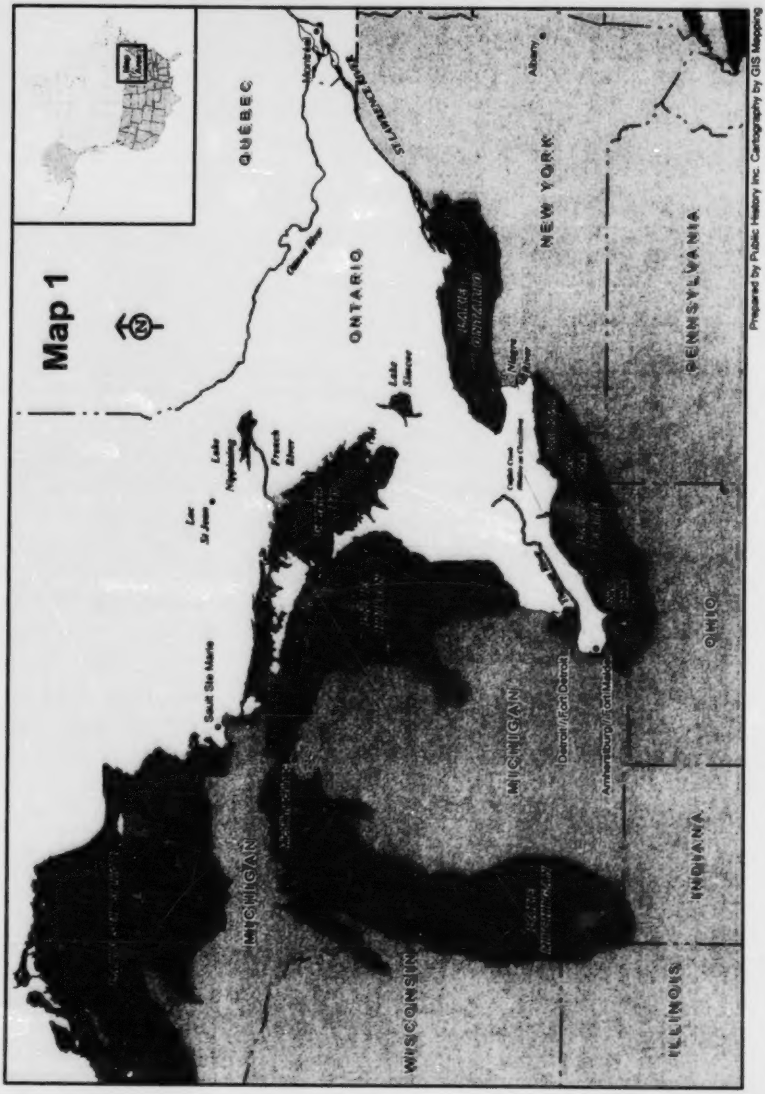
The settlement at Fort Detroit grew slowly. By 1710, only 63 white men (non-soldiers) lived at Detroit, and "for more than another decade Detroit remained little more than an isolated trading post on the fringes of

---

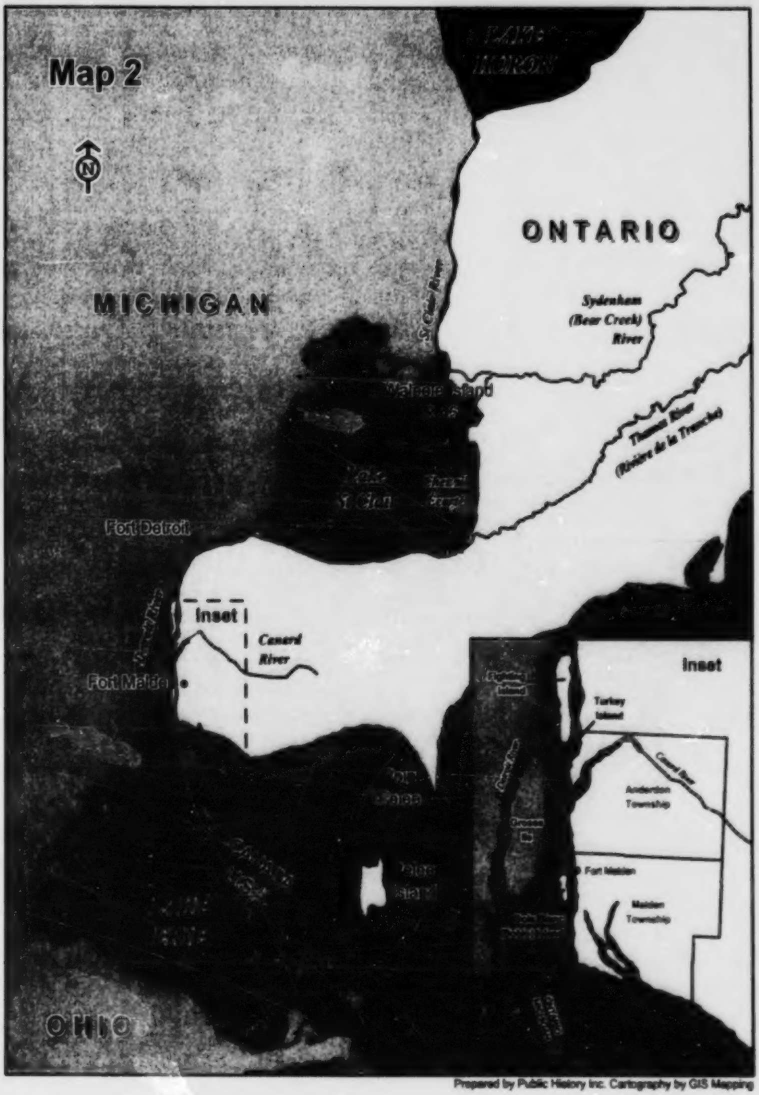
[13] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), xxxii.

[14] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), xxix, xxxii.

[15] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document A4, 8.


Map 1
N
QUÉBEC
ONTARIO
NEW YORK
PENNSYLVANIA
OHIO
INDIANA
ILLINOIS
WISCONSIN
MICHIGAN
MICHIGAN
Montréal
St. Lawrence River
Albany
Lake Ontario
Niagara River
Lake Simcoe
Lake Nipissing
French River
Sault Ste Marie
Detroit / Fort Detroit
Amherstburg / Fort Malden
Lake Michigan

Prepared by Public History Inc. Cartography by GIS Mapping


Map 2
N
LAKE HURON
ONTARIO
MICHIGAN
St. Clair River
Sydenham (Bear Creek) River
Walpole Island
Thames River (Rivière de la Tranche)
Fort Detroit
Inset
Canard River
Fort Malde
OHIO
Inset
Fighting Island
Turkey Island
Canard River
Anderdon Township
Grosse Ile
Fort Malden
Malden Township

Prepared by Public History Inc. Cartography by GIS Mapping

civilization."[16] It was not until about 1730 that voyageurs began to make their headquarters at Detroit, and settlers (both discharged soldiers and French immigrants from the east) took up farm land near the fort.

Some native villages were also attached to the fort. When he established the post at Detroit in 1701, Cadillac invited the Indian tribes of the lakes region (Ottawa and Potawatomi from Lake Michigan, Huron from Michilimackinac, and Chippewa from Sault Ste Marie) to settle near the fort. This proximity would assure a steady supply of furs for the traders. An anonymous memoir dated 1718 describes a Potawatomi village of about 180 men adjoining the fort, a Huron settlement of 100 men with substantial houses and well-kept fields of corn, peas, and beans "perhaps the eighth of a league from the French fort," and more than 100 Ottawa with bark cabins and fields in crop on the opposite side of the river. The Chippewa were farther away:

> Twelve leagues from Fort Detroit, always going up the river, you will find the Misisague [sic] Indians, who occupy a beautiful Island where they raise their crops. They are about 60 or 80 men.[17]

Three years later, the Governor of New France described the location of the various Indian settlements, and, except for the Potawatomi, gave increased numbers:

> To the south-west of the fort, inclining towards Lake Erie, are the Hurons and the Poutouatamis who occupy a league of the above stretch [of frontage]. To the south on the other side of the river, are the Outaouais who, together with the Hurons and Poutouatamis have made wastes containing about two leagues frontage by eight arpents deep. Above the Lake St. Clair, twelve leagues from the fort on the south side is a village of Mississagues and Sauteurs whose waste lands contain about three quarters of a league frontage by fifteen arpents deep.
>
> The tribe of the Outaouais consists of 130 men; that of the Poutoutamis of 150 men; that of the Hurons of 120; and that of the Mississagues and Sauteurs of 100.[18]

In the same year, 1721, a Jesuit priest named Pierre-François-Xavier de Charlevoix described his trip to the area. Although he gave details of Huron and

---

[16] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), xlii–xliii.

[17] Anonymous Memorandum of Indians at Detroit, 1718, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document B6, 24–26.

[18] Extracts from the Answer of Mm. Vaudreuil and Bégin to Cadillac's Petition, Quebec, November 4, 1721, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document B7, 26 (ICC Exhibit 3).

Potawatomi he met closer to the fort, he noted that he "spent the night above a beautiful island called the Island of Bois Blanc," but did not mention meeting any Indians there.[19]

In 1742, the Jesuits removed their mission from the land near the fort and settled most of the Huron on Bois Blanc Island and the adjacent mainland on the east side of the river. The following year, they contracted with Jean-Baptiste Goyau to take charge of the "farm of the Jesuit mission," which at one point in the account book was described as "this farm of the Island of Bois Blancs."[20] A 1747 manuscript lists the various families (534 persons plus an unknown number of children) in the "Huron village of the Island of Bois Blancs," which comprised 33 cabins or lodges in two villages.[21] Some of the mission, at least, was located on the island itself, for in 1749, a year after the village was abandoned and moved to "La Pointe de Montreal," across the river from Fort Detroit, Joseph-Gaspard Chaussegros de Léry mentioned it in his record of his journey up the Detroit:

> 3/4 of a league from the entrance of the Detroit River we came to the lower end of l'Isle au Bois Blanc where was located the former village of the Hurons. L'Isle aux Bois Blanc is ½ of a league long and shaped like a rectangle with rounded corners.[22]

In his subsequent report of October 22, 1749, de Léry recommended that they "begin by settling the Bay of the Detroit River, that is the bay opposite Bois Blanc Island, where in 1748 was located the village of the Hurons."[23] The war between the French and the British that would ultimately decide sovereignty in North America prevented these plans from being realized.

POLICY REGARDING ABORIGINAL LANDS

Whereas the French had concentrated on forming military and trading alliances with the Indian Nations and had not pursued any policy with regard to land ownership, the British recognized that, to prevent future trouble, the purchase of Indian lands must be regulated. The strengthening position of France in the new world and the increasing loss of Indian allies to the French caused representatives of the British colonies to meet in a general council at Albany, New York, in 1754. Among the problems in the colonies' relations with the Indians was the purchase of lands by individuals. The remedy cited was the restriction of such sales, except to the Crown:

---

[19] Journal of Pierre-F.-X. Charlevoix, Fort Pontchartrain, June 8, 1721, in Ernest J. Lajeunesse, ***The Windsor Border Region: Canada's Southernmost Frontier*** (Toronto: Champlain Society, 1960), Document B8, 26–27 (ICC Exhibit 3).

[20] Extracts from the Account Book of the Huron Mission, in Ernest J. Lajeunesse, ***The Windsor Border Region: Canada's Southernmost Frontier*** (Toronto: Champlain Society, 1960), Document B11, 30–32 (ICC Exhibit 3).

[21] Extracts from the Potier Manuscript, in Ernest J. Lajeunesse, ***The Windsor Border Region: Canada's Southernmost Frontier*** (Toronto: Champlain Society, 1960), Document B12, 35 (ICC Exhibit 3).

[22] Journey of Joseph-Gaspard Chaussegros de Léry to Detroit in 1749, at July 25, in Ernest J. Lajeunesse, ***The Windsor Border Region: Canada's Southernmost Frontier*** (Toronto: Champlain Society, 1960), Document C1, 43 (ICC Exhibit 3).

[23] Léry's Report of His Journey to Detroit [Quebec, October 22, 1749], in Ernest J. Lajeunesse, ***The Windsor Border Region: Canada's Southernmost Frontier*** (Toronto: Champlain Society, 1960), Document C4, 46 (ICC Exhibit 3).

> That purchases of lands from the Indians by private persons for small trifling considerations, have been the cause of great uneasiness and discontents, and if the Indians are not in fact imposed on and injured, yet they are apt to think that they have been and indeed they appear not fit to be intrusted at large with the sale of their own lands, and the Laws of some of the Colonies which make such sales void, unless the allowance of the Govern^t be first obtained, seem to be well founded.
>
> ...
>
> That all future purchase of lands from the Indians be void unless made by the Govern^t where such lands lye, and from the Indians in a body in their public councils. That the patentees or possessors of large unsettled Territories be injoyned to cause them to be settled in a reasonable time on pain of forfeiture. That the complaints of the Indians, relative to any grants or possessions of their lands fraudulently obtained be enquired into and all injuries redressed.[24]

Soon after the Albany conference, France and Britain, each supported by its Indian allies, waged war for the control of North America. What has become known as the Seven Years' War ended in North America in 1760, when the French surrendered to the British. By the Articles of Capitulation signed in September of that year, the Indians were to be maintained in their lands, and the western posts, including Detroit, came into British possession. Soon after, a British occupation force of more than 200 soldiers arrived at Detroit.[25] According to the journal of the Deputy Superintendent General of Indian Affairs, George Croghan, who accompanied the troops, the British were met at the mouth of the Detroit River by "the Chiefs of the Wyandotts, Ottaways and Putawautamies who bid us wellcome to their Country."[26]

---

[24] Report to Council, July 9, 1754, E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New-York* ..., 15 vols. (Albany, NY: Weed, Parsons & Co., 1856–87), 6: 888 (ICC Documents, p. 8).

[25] Articles of Capitulation for the Surrender of Canada, September 6, 1760, Articles 3 and 40, in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New-York* ..., 15 vols. (Albany, NY: Weed, Parsons & Co., 1856–87), 6: 1107–20 (ICC Documents, pp. 9–22), and Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), lxxvi.

[26] Extract from George Croghan's Journal, November 27, 1760, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document E3, 93 (ICC Exhibit 14, document 6).

On September 9, 1760, Sir William Johnson, the Superintendent General of Indian Affairs, held a council at Detroit with the Indian nations of the "Wiandots, Saguenays, Ottawas, Chipeweighs, Powtewatamas, Kickapoos, Twightwees, Delawares, Shawanese, Mochicoons, Mohocks, Oneidas & Senecas," many of whom had fought against the British during the war. Johnson presented a wampum belt to renew the Covenant Chain of friendship and alliance, made almost a century before, and assured those present that "it is not at present, neither hath it been his Majestys intentions to deprive any Nation of Indians of their just property by taking possession of any Lands to which they have a lawful claim, farther than for the better promoting of an extensive commerce, for the security and protection of which (and for the occupying of such posts as have been surrendered to us by the Capitulation of Canada)."[27]

News that the Treaty of Paris between France and Britain was signed in February 1763 surprised and upset the Indian nations near Detroit, "as till now they always expected Canada would be given back to the French on a Peace. They say the French had no Right to give up their Country to the English."[28]

THE *ROYAL PROCLAMATION OF 1763*

On October 7, 1763, King George III issued a *Royal Proclamation* to formalize all previous instructions and policies and to establish some rules for the management of the territory. Although the Crown claimed sovereignty over the entire territory, it also decreed that interior lands were to be considered the possession of the Indian tribes who occupied them. The area covered by the *Proclamation* included the 13 Colonies plus the new procurements of East and West Florida and Quebec. Quebec's western and northern boundaries were defined by a line drawn through Lac St-Jean to Lake Nippissing, then southeast to the intersection of the St Lawrence and the 45th parallel of north latitude.[29] The Detroit River/Lake St Clair region lay well within this provincial boundary to the southwest, placing it in the vast area reserved by the *Royal Proclamation* for Indian use. Aboriginal peoples in the area possessed aboriginal title to their lands which could only be extinguished by negotiation with the Crown.[30]

---

[27] Transcript of Proceedings at a Treaty held at Detroit, September 9, 1761, National Archives of Canada (hereafter NA), RG 10, vol. 6, pp. 100–6 (ICC Exhibit 14, document 7).

[28] Extract of a letter from George Groghan to Sir William Johnson, April 24, 1763, in NA, RG 10, vol. 6, 406 (ICC Exhibit 14, document 10).

[29] D.G.G. Kerr, ed., *A Historical Atlas of Canada* (Don Mills, Ont.: Nelson, 1966), 31.

According to the *Proclamation*, non-aboriginals were not allowed to enter this Indian Country for settlement purposes; any who had already done so were ordered to leave; and all private persons were forbidden to buy the right of occupancy from any Indian band or tribe. When lands were required, and when an Indian group was willing to sell its land, royal representatives were to meet the concerned Indians in a public meeting to make the purchase for, and in the name of, the Crown:

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them or any of them, as their Hunting Grounds; ...
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection, and Dominion, for the Use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for the Purpose first obtained.
>
> ... We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colonies ... .[31]

This land purchase policy was stressed in instructions sent to Governor James Murray in December 1763:

> 62. Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, of pain of Our Displeasure, all Our Subjects

---

[30] Douglas Leighton, *The Historical Development of the Walpole Island Community*, Occasional Paper No. 22, March 1986 (Wallaceburg: Walpole Island Research Centre, 1986), 15–16.

[31] *Royal Proclamation*, October 7, 1763 (ICC Documents, pp. 29–31).

> from making any Purchases of Settlements whatever, or taking Possession of any of the Lands reserved to the several Nations on Indians, with whom We are connected, and who live under Our Protection, without Our especial Leave for that Purpose first obtained; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner and under the Regulations prescribed in Our said Proclamation.[32]

In January 1764, William Johnson informed the Six Nations of the *Royal Proclamation* land provisions and promised copies for them and other nations:

> You need be under no Apprehensions concerning your Lands or Possessions after what I have lately informed you of his Majestys Royal Proclamation, commanding that no Lands whatsoever should be taken from you, nor any Purchase attempted to be made, but with your Consents in a publick Meeting of each Nation; and as I am getting Copies of that Proclamation printed, so soon as they are ready, I shall send one to your Nation (as well as to the rest) for your satisfaction on that head.[33]

By April 1765, the four Indian nations around Detroit appeared to know about the land purchase provision, as at that time each complained to the Deputy Superintendent General about lands that had been occupied by the French without compensation:

> ... April 2nd – The Chiefs of the Wyondatts or Huron, came to me & said they had spake last summer to Sir Willm Johnson at Niagra about this land on which the French had settled near Detroit belonging to them, & desired I would mention again to him, they never had sold it to the French and expected their new Fathers the English would do them Justice as the French were become one People with us.
>
> 4th – [Pondice] with several Chiefs of the Ottawas, Chippewas & Potowatamies likewise complained that the French had settled part of their Country, which they never had sold to them, & hoped their Father the English would take it into consideration & see that a proper satisfaction was made to them. That their Country was very large and they were willing to give up such part of it as was necessary for their Father the English to carry on Trade at, provided they were paid for it & a sufficient part of the Country left to them to Hunt on.[34]

---

[32] Instructions to James Murray, December 7, 1763, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), lx (ICC Exhibit 14, document 18).

[33] Speech dated January 20, 1764, by Sir William Johnson to the Six Nations, in James Sullivan et al., eds., *The Papers of Sir William Johnson*, 14 vols. (Albany, NY, 1921–65), 11: 30–31 (ICC Exhibit 14, document 20).

[34] Journal of George Croghan, September 4, 1765, NA, MG 11, CO 323, vol. 23, p. 10 (ICC Exhibit 14, vol. 1, document 32).

It is not known what response or action this complaint elicited. However, in direct contravention of the *Proclamation*, private land sales between British subjects and Chiefs, including some witnessed by the Deputy Superintendent General, were transacted in the Detroit region, beginning almost immediately after the 1765 Detroit peace treaty was concluded.[35] The practice continued through to 1771, for, in April of that year, General Thomas Gage, Commander-in-Chief of the British forces at New York, commented on recent dispatches dealing with land grants at Detroit. Gage's letter to the Commander at Detroit clearly states that all previous grants, whether to the French or the British, were to be voided, since the sales were made without the King's permission and authority:

> Your letters of the 14th and 18th December are very full on the subject of Grants & Lands at the Detroit. I am to explain to you that the King has not invested any Person whatever with the power of granting Lands in America, except to his Governors, within the limits of their respective Provinces & under certain forms and restrictions, and where any Purchase is made of the Indians tho' within the limits of the Provinces they are not valid, unless permission is given so to do & the purchase made in presence of the Governor & His Majesty's Superintendent of Indian Affairs. From hence you will know the power of granting Lands at Detroit remains solely in the King & that no Purchase can be made of the Indians but with the King's permission & authority.
>
> It may be needless after the above explanation to inform you that all grants made by Lieut: Colonel Gladwin, Major Bruce or any other British Commander are null & void & of no value.
>
> As for the French grants in general unless approved of by the Governor General of Canada & registered accordingly they were not valid ...
>
> ...
>
> I am now to require of you, as soon as this is received annul & make void by Public Act every concession made by Monsr. Belestre in the year 1760, every grant by every British Commander, without exception, and all Indian Purchases whatever or Indian Deeds not obtained by the King's permission and authority – And that you do not suffer any settlements to be made with the above Titles or any new settlements to be begun on any pretense whatever, and that you pull down as fast as any Person shall presume to build up – And that you do seize and send down the Country all Persons who shall be endeavouring to settle among the Savages.[36]

---

[35] See Victor P. Lytwyn, "Historical Research Report on British Policy Regarding the Granting of Islands in the Context of Bois Blanc (Boblo) Island in the Detroit River," March 5, 1999, pp. 18–19 (ICC Exhibit 14).

[36] General Gage, New York, to Commander at Detroit, April 8, 1771, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document C17, pp. 64–65 (Exhibit 12, pp. 2–3).

In June and July 1776, Governor Henry Hamilton met with Ottawa, Huron, and Potawatomi at Detroit to discuss various requests for non-natives to purchase land. According to notes kept in a diary by the Deputy Indian Agent, Hamilton admitted that the different nations "were certainly the proprietors & owners of their Lands as much as of the skins they hunted for, and could dispose of them," but, to prevent fraud, the King had imposed rules for land sales.[57] Hamilton declared that "it would be impossible for him to act contrary" to the stipulations in the 1763 *Proclamation*, and consistently stated that he would listen to the various requests and report them to "the General" for his answer.[58]

The Ottawa had a list of 18 lots that had been surveyed along the river, including the names of the purchasers. The precise location of these lots was not identified, but, in a subsequent meeting, the Huron Chiefs declared that they had no interest in "what the Ottawas have done above the settlement ... but the land below on both sides of the River is our Property of which we have proofs."[59]

Governor Hamilton deferred any applications for land across the river from the settlement and along the river because both the Huron and the Potawatomi disputed the other's right to negotiate. The Huron declared that they had been the first people to inhabit the territory and that the Potawatomi came later, escaping from their enemies, "the Renards," and were given refuge by the Huron: "They have not nor ever had any property here but their village."[60] The Potawatomi, in contrast, said that the "Commandt" at Fort Detroit had divided the land:

> ... the Ottawas on the South side of the River, the Puttawatamies below the Fort & the Chippawas higher up – The Hurons came after and settled where young Savoyard now lives, from thence they went to the mouth of the River on the south side and some to Sandusky – one of their Chiefs came back to Savoyard's & little by little they all came up & settled at the point of Montreal & that side of the river was given them. They have one side & we the other.[61]

---

[57] Diary [of John Hay, Deputy Indian Agent, Detroit], June 13 and July 7, 1776, NA, MG 19, F35, series 1, lot 687, pp. 53 and 64 (ICC Exhibit 14, document 48).

[58] Diary [of John Hay, Deputy Indian Agent, Detroit], July 8, 1776 , NA, MG 19, F35, series 1, lot 687, pp. 67–69 (ICC Exhibit 14, document 48).

[59] Diary [of John Hay, Deputy Indian Agent, Detroit], June 13 and July 7, 1776, NA, MG 19, F35, series 1, lot 687, pp. 53–54 and 64 (ICC Exhibit 14, document 48).

[60] Diary [of John Hay, Deputy Indian Agent, Detroit], July 8, 1776, NA, MG 19, F35, series 1, lot 687, p. 66 (ICC Exhibit 14, document 48).

[61] Diary [of John Hay, Deputy Indian Agent, Detroit], July 10, 1776, NA, MG 19, F35, series 1, lot 687, p. 71 (ICC Exhibit 14, document 48).

LAND GRANTS TO SCHIEFFELIN AND THE INDIAN OFFICERS, 1783–84

The American War of Independence, begun in April 1775, ended with the surrender of the British forces in October 1781. Provisional articles of peace were signed in Paris on November 30, 1782. Shortly after, British officers were ordered to begin reducing the number of men under their command and, by the middle of May 1783, men stationed at Fort Detroit spoke "confidently" of the boundaries agreed on by Britain and the United States and of their numbers "being reduced altogether."[42] The Treaty of Paris, concluded on September 3, 1783, defined the boundary in part as the middle of the "water communication" between Lake Erie and Lake Huron (situating Detroit in American territory) and decreed that Britain would, "with all convenient speed," withdraw its armies and garrisons from the U.S. territory.[43] (The British did not, in fact, withdraw from Detroit until 1796, but it is doubtful that such a protracted delay could have been envisaged at the time.)

Loyalist officers and employees at Fort Detroit made haste to try to secure land on what was to be declared the British side of the Detroit River. One particular seven-mile-square area of land at the mouth of that river caused much controversy. Early in 1783, two officers, Captains William Caldwell and Matthew Elliott, appear to have squatted on particular sites within that block and, along with Captain Henry Bird and Deputy Indian Agent Alexander McKee, were negotiating with the local Huron for a "deed" to the block.[44] Before they could conclude that transaction, however, Lieutenant Jacob Schieffelin, Secretary of the Indian Department at Detroit, obtained deeds for the land from some Ottawa, Chippewa, and Potawatomi Chiefs. Only the deed from the Ottawa was registered and survives, but there is on record a list of "Chiefs at the granting the Land to Mr. Schieffelin" which includes the names of six chiefs of the Chippewa Nation and two from the Potawatomi Nation.[45] The "deed" from the Ottawa dated October 13, 1783, was registered "in the Register of Detroit No. 2 page 283 and 284 by T. Williams, Esq. Recorder

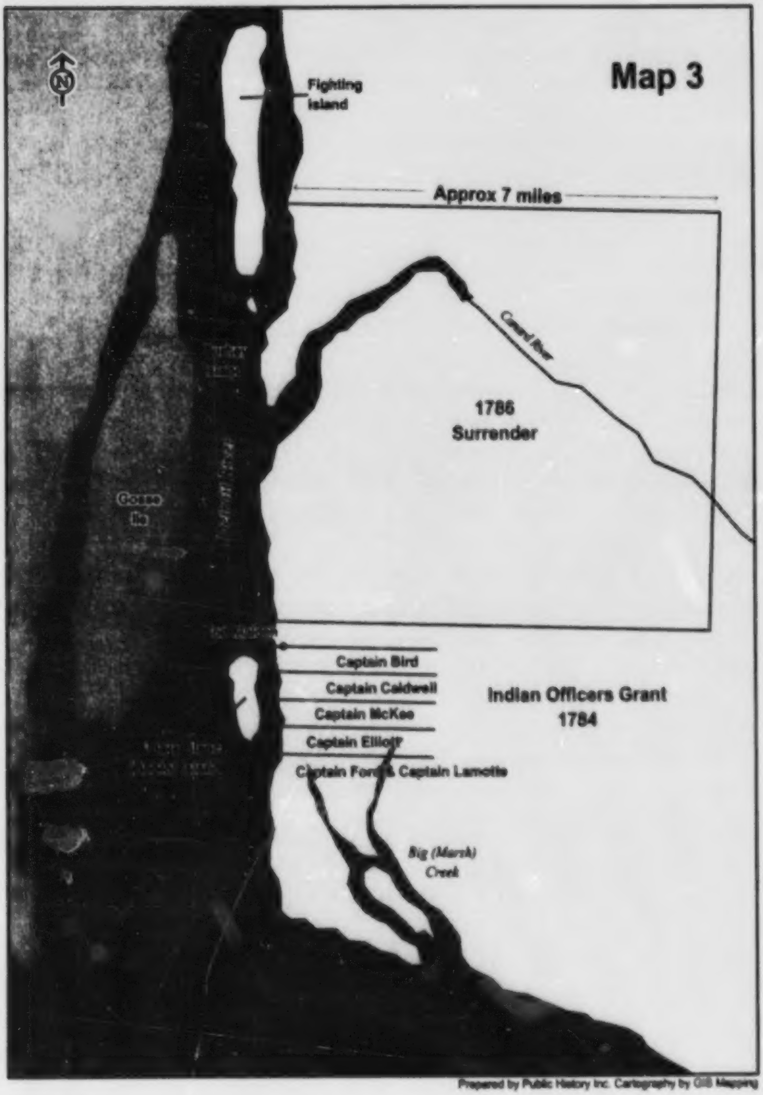
---

[42] Major Arent S. DePeyster, Detroit, to Brigadier-General Allan Maclean, Niagara, May 17, 1783, printed in *Michigan Pioneer and Historical Society* 20 (1892): 116 (ICC Exhibit 14, document 74).

[43] King George III and United States of America, September 3, 1783, Treaty of Paris (ICC Documents, vol. 1, pp. 87–91).

[44] Alexander McKee, Detroit, to Sir John Johnson, October 11, 1783, and Captain Bird, Rivers Mouth, to Captain Matthews, October 15, 1783, both in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Documents G2 and G3, 155–57 (ICC Exhibit 3).

[45] List, "Present This Day the Undermentioned Chiefs at the Granting the Land to Mr. Schieffelin," October 13, 1783, in NA, RG 1, L4, vol. 2, pp. 85–86 (ICC Exhibit 13, document 36).


Map 3
N
Fighting Island
Approx 7 miles
Canard River
1786 Surrender
Gosse Ile
Captain Bird
Captain Caldwell
Captain McKee
Captain Elliott
Captain Ford & Captain Lamotte
Indian Officers Grant 1784
Big (Marsh) Creek

Prepared by Public History Inc. Cartography by GIS Mapping

and Justice of the Peace."[46] According to the terms of this deed, seven "Principal Village Chiefs and War Chiefs of the Ottawa Nation residing near Detroit" granted Schieffelin a "tract or parcel of Land of seven miles in front and seven miles in depth on the south side [i.e., in British territory] of the Detroit River, opposite the Isle au Bois blanc." The grant was made "in consideration of our affection and esteem" for Schieffelin, and specified no payment in money or goods.[47]

McKee and Bird wrote letters of complaint as soon as they heard rumours of the transaction, and, within a week, Chiefs of the local Ottawa, Chippewa, and Huron began a series of four councils with McKee and others (including the Commanding Officer at Detroit on two of the days) to accuse Schieffelin of deceit and to plead for the return of the "deed." The Chippewa were represented at all the councils, but did not speak. Attending on behalf of the Ottawa at all four councils were some of the men who had signed Schieffelin's deed, as well as Egusheway, their principal Chief, who had not signed the deed. The Huron attended only the last two days of the council: Chief Syndosan spoke on their behalf, but repeatedly referred to Egusheway as "our Great Chief" and "one of the principal men amongst us" (October 21). Potawatomi, it was reported, were away "at a Distance" (October 18). Negig, one of the signers, stated that he believed all four tribes had an interest in the land. Consequently, when Schieffelin told him the Huron had already given away the lands, he believed his signature was merely a ratification of an earlier deed:

> Mr. Schieffelin ... asked me Brother to whom do the lands on the mouth of the River belong, do they belong to the Hurons alone? I reply'd that my Father told me they belonged to the Hurons, Ottaways, Chippeways & Pottawattomies, but I was not certain & that he might inform himself better from some one else more intelligible. After I made this Reply, the Chippaways & Puttawattomies says some [of] the Hurons have already given away their Lands, let us give away our Part also.
>
> Mr. McKee then asked who had informed them that the Hurons had given away their Lands, rather the land in question. He answered Mr. Schieffelin had told him so, that was the Reason that I consented to give my part & was the first fool that signed the Paper. Our principal Chief Egusheway was not present when we signed. The Ottaways gave away Lands on the South shore of Lake St. Clair leading towards the River la Tranche. I was out hunting at that Time when I returned & being informed

---

[46] List, "Present This Day the Undermentioned Chiefs at the Granting the Land to Mr. Schieffelin," October 13, 1783, in NA, RG 1, L4, vol. 2, pp. 85–86 (ICC Exhibit 13, document 36).

[47] Indian Deed to Jacob Schieffelin, October 13, 1783, NA, MG 21, Haldimand Papers, Add Mss 21783, ff. 275–76v (ICC Exhibit 13, document 35).

> thereof. The Deeds were presented to me, on seeing the names of our principal Chiefs signed thereto I affixed mine also, I thought this affair of Mr. Schieffelin was the same, only this Difference, that I did not see the signature of the Hurons to that Paper as he had told me, in that he deceived me.[48]

Both the Ottawa Chief, Egusheway, and the Huron Chief, Syndosan, stated and restated the notion that "[i]f we were inclined to give our Lands it would be to people that fought with & assisted us in defending them."[49] Egusheway also stated that if, in future, they agreed to give up their lands, "the proper Chiefs to whom these lands belong will assemble together in public & think of the people that are to get them."[50] That the Ottawa could not alone cede the lands was underscored when Egusheway addressed Schieffelin at the council, saying that if he did not give up his deed, "you will breed mischief between us & the Hurons."[51]

Governor Haldimand wrote to Lieutenant Governor Jehu Hay on April 26, 1784, denying Schieffelin's claim and, at the same time, emphasizing the impropriety of all such grants to individuals rather than the Crown:

> [T]he claims of individuals, without distinction, upon Indian Lands at Detroit, or any other part of the Province are INVALID, and the mode of acquiring lands by what is called Deeds of Gift, is to be entirely discountenanced, for by the King's instructions, no private Person, Society, Corporation, or Colony, is capable of acquiring any property in lands belonging to the Indians, either by purchase of, or grant of conveyance from the said Indians, excepting only where the lands lye within the limits of any colony ... no Purchase of Lands belonging to the Indians, whether in the name or for the use of the Crown, or in the name or for the use of Proprietaries of Colonies be made, but at some general meeting at which the Principal Chiefs of each Tribe claiming a proportion in such lands are present; and all tracts so purchased must be regularly Surveyed by a Sworn Surveyor in the presence and with the assistance of a Person deputed by the Indians to attend such Survey, and the said Surveyor shall make an Accurate Map of such Tract, describing the Limits, which map shall be entered upon the Record with the deed of conveyance from the Indians.
>
> These instructions lay totally aside the claim of Mr. Schieffelin ... to an Indian Grant of Land, even had he obtained it by less unworthy means than He did.[52]

---

[48] Minutes of a Council with Ottawa and Chippewa Chiefs, October 18, 1783, NA, RG 10, vol. 1832, pp. 268–69 (ICC Documents, pp. 66–68).

[49] Minutes of Council, October 18, 20, 21, and 22, 1783, NA, RG 10, vol. 1832 (ICC Documents, p p. 65, 66, 83).

[50] Minutes of a Council with Ottawa and Chippewa Chiefs, October 18, 1783, NA, RG 10, vol. 1832, p. 268 (ICC Documents, p. 66).

[51] Minutes of a Council with Ottawa and Chippewa Chiefs, October 18, 1783, NA, RG 10, vol. 1832, p. 267 (ICC Documents, p. 65).

[52] General Frederick Haldimand, Governor, Quebec, to Lieutenant Governor Hay, April 26, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G5, 157–58 (ICC Documents, pp. 92–93).

In the same letter, however, Haldimand did not rule out consideration of the application made by the Indian officers (officers who had served with the Indians) to these same lands:

> Some application to, or offer from the Indians at Detroit for Lands has been made in favor of the Officers and Interpreters who have served during the war with them – Should it be renewed on your arrival there you will please to communicate the circumstances to me, describing particularly the Tract of Land, the persons applying for it &c and such part of the Transaction as may concern the Indians must, at the same time, to be reported to Sir John Johnson thro Mr. McKee, His Deputy at Detroit.[53]

Hay responded on June 8, 1784, that it was too late to discontinue grants made to individuals by Indians,

> as almost all the Land between the Lakes Erie and Huron on both sides the Streight is claimed and a great part settled upon and improved. ...
>
> I am informed several of the reduced Provincial Officers and many of the Soldiers wish to settle on the South side of Detroit rather than anywhere else –
>
> Several have built upon and improved Lands who have no other Pretensions than the Indians consent possession, Captains Bird and Caldwell are of the number, at a place they have called Fredericks Burg.[54]

On the same day, it would appear that the Indian officers received a grant to the seven-mile-square block, plus a larger area adjacent to it. The first deed is not in the record, but is described by Haldimand on August 14, 1784:

> Captain Caldwell late of Lieut. Col. Butler's Rangers, being one of the officers to whom the Huron and other neighbouring Indian Chiefs at Detroit have given a Tract of Land situated at the mouth of the River Detroit, about seven miles square.[55]

The second grant, for which a torn copy exists, was made only by Ottawa Chiefs (Negig's name alone remains intact) and names the grantees as Alexander McKee, William Caldwell, Matthew Elliott, and Thomas McKee. The tract was described as

---

[53] General Frederick Haldimand to Lieutenant Governor Hay, April 26, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G5, 157–58 (ICC Documents, p. 93).

[54] Lieutenant Governor Hay to General Frederick Haldimand, July 22, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G6, 158–59 (ICC Documents, p. 93).

[55] General Frederick Haldimand to Lieutenant Governor Hay, August 14, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G7, 159 (ICC Documents, p. 93).

> [b]eginning at the Mouth of the little River where the Grant to the Indian Officers ends, & running up the said River two leagues, thence a Northeasterly course till it strikes the River [blank] bearing always in breadth two leagues from Lake Erie, thence down the said River to its Mouth and thence along the North side of the West end of Lake Erie to the place of begining [sic], being Bounded on the South by Lake Erie on the West by the little River where the Indian Officers Grant ends and on the North & East by unlocated Lands & the said River containing about Twenty Miles in length Two leagues in breadth ...[56]

It is difficult to locate the tract from the description in the text of the grant, but if one assumes that the "Little River" is the "Marsh Creek" indicated on maps of the period, then that river/creek would be the common boundary of the two tracts, and this second grant would extend 20 miles back of it. An area coinciding with this explanation is indicated on a map attached to a September 29, 1795, surrender of land to Alexander McKee.[57]

Caldwell renewed the settlement application for the four men to Governor Haldimand, stating that "the Indians are equally desirous with them for the speedy and effectual settling of the same as well as from a political view, as on account of the Regard they bear them, having so long served in the field together."[58] Haldimand admitted that he could not confirm the "gift" until a proper surrender was taken, but gave his permission for the officers to settle on and improve their lots:

> Altho' it is not in my power to gratify the wishes of the Persons concerned in this undertaking, and of the Indians by confirming their gift immediately without conforming to His Majesty's Instructions, communicated to you in my letter of 26th April last, I consider the intended Settlement as a matter that may prove of infinite utility to the Strength and Interest of this Province, and wish to give it every encouragement in

---

[56] Ottawa Chiefs to Indian Officers, June 8, 1784, NA, MG 19, F1, Claus Papers, vol. 14. pp. 416a–416 (ICC Exhibit 14, document 80).

[57] NA, National Map Collection 2835, H12/400/1795 (ICC Documents, p. 1). On August 3, 1787, Major Robert Matthews makes reference to a tract of land that seems to coincide with this one. He states that the land in the settlement at the mouth of the river which was given to McKee and the other officers was not large enough to provide land for all the ex-military men expected to settle in the country. "Caldwell, forseeing that, obtained a grant adjoining to it six Leagues upon the Lake, this he gave me upon behalf of the government & I went down lately to survey ..." Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G14, 166–67 (ICC Exhibit 3).

[58] Quoted in General Frederick Haldimand to Lieutenant Governor Hay, August 14, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G7, 159 (ICC Exhibit 14, document 82).

> my power ... In the mean time in order to make speedy provision for the maintenance of these His Majesty's Loyal Subjects now dismissed from His Service, I have agreed they shall carry on their Improvements with every diligence in their Power until the Land can be laid out & granted agreeably to the King's Instructions, and the mode in practice in the lower parts of the Province. You will please therefore to communicate the same to them, and give such orders as are necessary for that purpose.[59]

There is no evidence that the method and form of the Indian officers' grant differed in any way from Schieffelin's, and Haldimand directed McKee to explain to the Indians the steps required to effect a legal grant of land:

> It will be expedient that Mr. McKee should explain to the Indians the nature and intention of the precautions the King has taken to prevent their being iniquitously deprived of their Lands, and that they formally, in council, make over to the King, by deed, the tract in question, for the purpose they wish. Their deed must be transmitted to Sir John Johnson to be properly confirmed by the governor of the Province when regular grants will be given to the persons who are the proprietors of the Land.[60]

The lots for the officers and others were surveyed the following year by Deputy Surveyor Philip Fry, who described them as granted by the "Indians to the Loyalists."[61] As ordered, Fry set out four lots of six acres each for Bird, Alexander McKee, Caldwell, and Elliott.[62] However, in 1789 it was reported that these four officers occupied lots totalling 40 acres in front, "being the Space ----- [sic] fronting the whole length of the Island of Boisblanc [sic]."[63]

THE 1786 SURRENDER

Despite his superior's clearly stated rules and his own admonition to Schieffelin that purchases from Indians were to be taken only from the proper chiefs, and in public, Deputy Indian Agent Alexander McKee obtained a surrender in May 1786 from Chippewa and Ottawa Chiefs of both Bois Blanc

---

[59] General Frederick Haldimand to Lieutenant Governor Hay, August 14, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G7, 159 (ICC Exhibit 14, document 82).

[60] General Frederick Haldimand to Lieutenant Governor Hay, August 14, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G7, 159–60 (ICC Exhibit 14, document 82).

[61] Certificate of Philip Fry, Deputy Surveyor, March 25, 1785, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G9, 161 (ICC Exhibit 12, p. 28).

[62] Certificate of Philip Fry, Deputy Surveyor, March 25, 1785, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G9, 161 (ICC Exhibit 12, p. 28).

[63] Minutes of the Land Board of Hesse, August 14, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 3 (ICC Exhibit 14, document 94).

Island and a seven-mile-square block across the channel, immediately north of the Indian officers' grant. (In October 1783, Schieffelin had mentioned that "Mr. McKee has received a Gift from the Ottawas alone, the Island Commonly called Isle au bois Blânc at the mouth of the River of Detroit,"[64] but there is no deed or additional evidence to support that assertion.)

The deed, dated May 15, 1786, confirmed to His Majesty the King the surrender of the island and the mainland tract, "for and in consideration of the good will, friendship and affection which we have for Alexander McKee":

> [W]e, the principal village and War Chiefs of the Ottawa & Chipewa Nations of Detroit, for and in consideration of the good will, friendship and affection which we have for Alexander McKee, who has served with us against the Enemy during the late War, have by, & with the consent of the whole of our said Nations ... confirm unto His Majesty George the The [sic] Third, King of Great Britain, France and Ireland &c. &c. &c. a certain Tract or parcel of Land situated on the South Side of Detroit River, beginning at the Line granted on the seventh Day of June, one thousand seven hundred and Eighty four, by the Ottawas & Hurons, to Indian officers, & running an Easterly Course, along said Line, until it arrives at the End of Seven English Miles, from thence a northerly course bearing always in breadth Seven English Miles, from the said River Detroit till it strikes the most Northern Branch of the River Canard, thence down the said Branch and River Canard, to the mouth thereof, & from thence down the River Detroit to the place of beginning. Also an Island in the mouth of the said River Detroit, commonly known by the name of Bois Blanc.[65]

The deed was witnessed by Thomas Williams, John Clark, and Daniel Field and signed by four Chippewa Chiefs (Shaboque, Tickcomegosson, Misquecawpowee, and Nayquoscon) and five Ottawa Chiefs (Egusheway, Pondiac, Kinijiwanoe, Niquelon, and Assinowee). Research commissioned during this inquiry and conducted jointly on behalf of both parties concluded that none of the signatories to the 1786 Treaty could be specifically linked to the Walpole Island First Nation.[66]

---

[64] Jacob Schieffelin to Sir John Johnson, October 24, 1783, NA, MG 19, F35, series 1, lot 711, p. 22 (ICC Exhibit 14, document 78).

[65] Ottawa and Chippewa Chiefs to the Crown, May 15, 1786, NA, RG 1, L2, vol. B, pp. 245–46 (ICC Exhibit 13, document 38). The original of the surrender has not been located. This version is certified to be a true copy by D.W. Smith, Secretary to the Land Board of Hesse. Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G13, 165–66 (ICC Documents, Exhibit 3, tab 3), also provides a transcript that is almost identical to the one cited above. This surrender appears in Canada's compilation of *Indian Treaties and Surrenders* as No. 116, but contains many errors in transcriptions and omits a line.

[66] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, 3 (ICC Exhibit 13). Morrison also concludes that the four Chippewa signatories to the 1786 surrender "belonged to the Thames River and possibly the Pelee Island/Anderdon regional bands" (4). He submits, however, that although it is relatively simple to identify the nation of each of the Chiefs, it is difficult to identify the Chief's particular group or the subdivisions of the nations involved at the time.

Extensive research conducted over a number of years on behalf of both Canada and the First Nation failed to produce the documents usually associated with a purchase of land from the Indians. We have seen no instructions or letter of authorization to McKee from his superiors, no minutes of any council with the Chiefs, nor any report on the proceedings by McKee or other persons attending the transaction. No payment appears to have been offered or made, and no survey of the lands contemplated. In fact, the deed is not mentioned in any correspondence for a number of years.

In 1788, Upper Canada was divided into four administrative districts, one of which – Hesse – included land from Long Point on Lake Erie to Lake St Clair. Initially, judges and sheriffs were appointed to administer justice in each district, and later District Land Boards were established to receive and report on applications for land from settlers. McKee was a member of the Land Board of Hesse from its inception, but it is evident that other members of the Board were, for some months, ignorant of basic facts about the area entrusted to them. When McKee enlightened them, he apparently withheld information about his 1786 deed. In June 1789, the Governor, Guy Carleton, Baron Dorchester, instructed the Board to immediately establish a settlement, to be called George Town, at a location directly opposite Bois Blanc Island[67] – a site that had been recommended by Deputy Surveyor John Collins because its deep channel and safe anchorage would serve both military and commercial purposes.[68] On August 14, 1789, the Board reported that McKee had informed it that the particular location required for a town site had "never" been surrendered by the Indians, but was covered by the 1784 grant to the Indian officers:

> The Board received and having under consideration the letter from Mr. Secretary Motz of 15 June, respecting the immediate settlement of George Town have made the necessary enquiries into the claims of Indians or others being obstacles to the immediate execution of the plan, learn from Alexander McKee, Esquire, Deputy Superintendent of Indians that the land has never yet been bought from the Indians for the use of the crown and that he has no instructions from Sir John Johnson, the Superintendent-General on that head, but that the Indians have actually divested themselves of

---

[67] Henry Motz, Secretary (to Lord Dorchester), to the Land Board of Hesse, June 15 (or 14), 1789, referred to in Minutes of the Land Board of August 14, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 2–3 (ICC Exhibit 14, document 94), and in a letter from the Land Board of Hesse to Dorchester, August 28, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 28–29 (ICC Exhibit 14, document 97).

[68] Report of John Collins, Deputy Surveyor, District of Nassau, December 6, 1788, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 35P (ICC Exhibit 14, document 149).

> that land by deed bearing date 7 June 1784 ... in favour of certain officers and others who served with them during the war.[69]

The area covered by the May 15, 1786, transaction included land across from, or near to, Bois Blanc Island, but McKee apparently did not provide his fellow board members with the deed itself or information that it existed. On August 28, 1789, board members reported that it was impossible for them to comply with the general instructions for locating settlers because, according to information given to them by McKee, *none* of the lands in the District of Hesse had been surrendered to the Crown:

> Our progress on the general printed instructions, handed to us, is now altogether obstructed by information from Alexander McKee, Esquire, Deputy Superintendent of Indian Affairs, that none of the lands within the limits of the district have been purchased from the Indians for the Crown, altho they have been parcelled out in large grants to individuals by the natives, so as to leave none unclaimed from Long point on Lake Erie to Lake Huron.[70]

The Governor wrote to Superintendent Sir John Johnson shortly after and clearly stated that previous purchases of land by or grants to individuals from the Indians were totally void:

> [The Indians] should be reminded that all *Bargains of Individuals* with them respecting lands are *totally void*, against the law and can never be acknowledged by the Crown, that whatever lands are wanted for the settlement of the King's subjects, the King has made it an invariable rule to apply to the Indians and to satisfy them, for the cession thereof, afterwards to distribute such lands among his subjects according to justice and their deserts, that this law is for the comfort and security of the Indians, as well as for the maintenance of due order among the King's Subjects, and can never be departed from.[71]

At some point before the end of 1789, McKee submitted his 1786 deed and an accompanying memorial directly to Governor Dorchester, not to the Land Board. On January 21, 1790, Dorchester's secretary forwarded the deed and memorial to the Board for its consideration, while at the same time stating the Governor's opinion that the June 1784 deed presented the only equitable claim on lands in Hesse:

---

[69] Minutes of the Land Board of Hesse, August 14, 1789, copy in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 2–3 (ICC Exhibit 14, document 94).

[70] Letter from Land Board of Hesse to Governor Dorchester, August 28, 1789, copy in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 28 (ICC Exhibit 14, document 97).

[71] Copy of letter, Henry Motz, Secretary to Lord Dorchester, to Sir John Johnson, October 5, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 34 (ICC Exhibit 14, document 100).

> Confined to the information hitherto obtained, His Lordship perceives no ground to suppose that there is any pretence of equitable claims within any other Indian purchases or cessions, than that of June 1784 and consequently, that you will find scope for your trust to operate in every other part of the district. You will, therefore, be very particular in your minutes, if you shall see cause in the exercise of your discretion to give hopes to persons that indulge expectations under such Indian Grants, as were not made agreeable to the Royal Instructions, nor have yet had the countenance or approbation of the government.
>
> Mr. McKee's memorial for a tract ceded by the Indians to the Crown on the 15th of May 1786, with the deed left here in his behalf, is inclosed for the consideration and proceedings of the Board, agreeable to their general instructions.[72]

On April 16, 1790, the Board noted that it had received McKee's deed and memorial, but made no comment on it.[73] At its next meeting on April 21, it deferred reporting fully on those papers until after a survey of proposed townships and Crown reserves, but gave conditional consent – subject to the government's future ratification of the May 1786 deed – for Surveyor Patrick McNiff to settle on 200 acres of the land covered by that deed:

> That on Consideration of the Petition of Alexander McKee, Esquire, Deputy agent for Indian affairs, referred to the Board by Mr. Motz' letter of 21st January – The Board is of opinion that ... they cannot report thereon until they have an actual Survey with the distribution of Townships and reserves ascertained ... – and on Mr. McNiff's Petition having duly considered the clause of reference and the suggestion from below that the whole District (supposing it acquired to the Crown) is open to locations except the Grants of June 1784, the Board are of opinion that with an express knowledge given to the Petitioner of the nature of the intended reserves (he may be located on the Tract ceded to the Crown by the Deed of 15th May 1786) and on his intimation of consent to the condition of future ratification by the Government, he may take 200 acres not immediately occupied by any other person.[74]

A copy of McKee's memorial to Dorchester regarding the May 15, 1786, deed has not been found and may have been removed from the Land Board's records by McKee himself (the Board subsequently reported that "it was withdrawn by Mr. McKee 14 May 1790 *and has not been returned since*").[75] The only reference to its wording was made a year later by the Land Board of Hesse, which asserted that McKee had "claimed the Tract at the River Canard for his own use and that of his friends, and had petitioned for a Grant of it under the Crown."[76]

---

[72] Copy of letter, Henry Motz, Quebec, to Land Board of Hesse, January 21, 1790, NA, RG 1, L4, vol. 2, pp. 88–89 (ICC Documents, pp. 105–6).

[73] Minutes of Land Board of Hesse, April 16, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 6–7 (ICC Exhibit 14, document 106).

[74] Minutes of the Land Board of Hesse, April 21, 1790, copy in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 8 (ICC Exhibit 14, document 107).

Aside from the question of whether McKee personally had any claim to the tract, the Board apparently thought the deed was a valid surrender to the Crown. On May 14, 1790, the Board, worried that McKee's surrender negotiations were proceeding too slowly to allow for the various preparations required to receive Loyalists who had already been promised locations, suggested an immediate survey from Point Pelee to the officers' grant, because "at present the King has no regular Grant of any Land unappropriated but a square of seven miles on the River au Canard where they can be fixed."[77]

For his part, McKee indicated to Lord Dorchester as early as May 5, 1790, that he intended to settle Indian Loyalists on the block covered in his 1786 deed and hoped that the Governor would approve his application:

> [T]here is an Indian Settlement on the River Canard that cannot be removed without creating confusion and perhaps trouble nor will it be consistent with good policy or humanity to force them to quit. It was my intention by Soliciting these lands (as Indians were already fixed there) to have accommodated several families Likewise which to my knowledge from their attachment to Government have been drove from their antient [sic] settlements and who in case of emergency might be depended upon as well as any other Inhabitants, entertaining at the same time an Idea that all this description would be encouraged to live within the protection of the British Government. My application I understand has been laid before the Land Board at this place, which I can only apprehend is no more than to comply with common form in resting with the Governor In Council to act as he may judge proper, it is from him therefore I am to hope a completion of my desire during my journey among the Indians.[78]

McKee relinquished his interest in or claim to the land in a letter to Sir John Johnson on May 25, 1790, stating that the surrender was made to him in the name of the Crown to ensure that the Huron themselves were protected from encroachments by others:

---

[75] Letter from Land Board of Hesse to Land Committee, Quebec, May 6, 1791, in Proceedings of the Land Committee at Quebec, June 3, 1791, NA, RG 1, L1, vol. 18, p. 346 (ICC Documents, p. 201). Emphasis added.

[76] Letter from Land Board of Hesse to Land Committee, Quebec, May 6, 1791, in Proceedings of the Land Committee at Quebec, June 3, 1791, NA, RG 1, L1, vol. 18, p. 346 (ICC Documents, p. 201).

[77] Land Board of Hesse to Alexander McKee, May 14, 1790, in NA, MG 19, F1, Claus Papers, vol. 4, p. 177 (ICC Exhibit 14, document 108). The land covered by McKee's 1786 grant is often referenced to the River Canard, which is some distance north of the 1784 officers' grant.

[78] Copy of a letter from Alexander McKee, Detroit, to Lord Dorchester, Archives of Ontario, CO 42, vol. 68, pp. 215–16d (ICC Exhibit 14, document 86).

> That the intention and express purposes of the Deed of Cession to the Crown in 1784 [sic] of this Tract, was in trust to me to secure the Indians from encroachments, being convinced they would be disturbed in their possessions, which eventually must have produced troubles between them and the white Inhabitants, and to evince the truth of this, I have no Objections to relinquish any Interest or Claim, to the said Tract, for the public good.[79]

In an undated memo (possibly written in the summer of 1790), Major Patrick Murray, the Commanding Officer at Detroit, echoed McKee's interpretation of the events surrounding the May 1786 agreement, both as to the trust agreement and the relinquishment of any personal interest of McKee:

> 6. That the Intention and Express Purpose of the Indians by their Deed of cession to the Crown in 1784 [sic] of this tract, was [word crossed out] in trust for Alex McKee Esq to whose regard for them, they were agreed to intrust their interests that this Deed being in trust to the Crown for the above purpose only, it cannot be considered as transferring the Property to the Crown for any other purpose – and accordingly the Governor in Council only leaves it to the Land Board to Report whether a Grant ought to be Given or not to Mr. McKee but certainly never considered the Crown as willing to accept of or dispose of it for any other Purpose than that designed by the Grantors. [and crossed out?] The Grantee finding it for the public good to relinquish the benefit intended him by the Deed, rather than applied to purposes contrary to the intention of the trust, and which must have been attended with serious and calamitous Consequences to this Community as a growing Settlement. By so doing leaves it to the Grantors to dispose of it agreeable to their pleasure.[80]

As a final word on this matter, the Land Council at Quebec conducted an investigation in 1830 into Indian ownership of lands along the Detroit River, during which the members examined the "Papers remaining among the Archives of the Council Office, which are all that they have been able to find having any important bearing on this case."[81] The Council questioned the Huron and Potawatomi's exclusion and McKee's version of events:

---

[79] Copy of letter from Alexander McKee to Sir John Johnson, May 25, 1790, NA, RG 1, L4, vol. 3, pp. 386–9 (ICC Documents, p. 148).

[80] Major Murray, Draught respecting the necessity of making a Reserve of Land at the Huron Church and River Canard for the Indians, NA, MG 19, F1, Claus Papers, vol. 4, p. 230 (ICC Exhibit 14, document 84). Note: The reference to 1784 in this document is clearly an error, since the 1784 officers' grant was not "in trust for the Crown," nor was it issued in McKee's name alone. Instead, it is evident that it refers to the 1786 surrender.

[81] Minutes of the Council at Quebec, March 12, 1830, NA, RG 1, E1, p. 322 (ICC Documents, p. 299). This Council was asked to report to His Excellency, Sir John Colborne, the Lieutenant Governor of Upper Canada, as to how to approach the issue of obtaining the lands reserved in 1790 (the "Huron Reserve") for their use in settlement.

> On the 15th May 1786 the Ottawa and Chippewa Nations made a Cession of this Tract to His Majesty. It is remarkable that neither the Pottawatomies nor Hurons are parties to this Cession and that no Notice is taken of their Interest, or of the fact that the Huron were occupying a part of the Tract. It is stated in this Deed that the Cession to His Majesty was made in consideration of the friendship of the Nations for Alexander McKee. The use afterwards attempted to be made of the Deed of Cession by Captain McKee naturally leads to the conjecture that he was desirous of extinguishing the claims of the two Nations making it, and that he relied upon being able to gain the separate assent (or perhaps had gained the assent) of the Hurons, who as they resided in the District were always accessible. Why the Pottawatimies [sic] were not required to concur does not appear. They perhaps had not any Interest in the Lands Ceded.
>
> Having obtained the Deed of Cession made to His Majesty but expressed to be made upon consideration applys [sic] personally to himself, Captain McKee addressed a Memorial to Lord Dorchester applying for the Land thus Ceded transmitting (as it seems) the Deed, and a Sketch of the Tract, which Memorial and Papers were transmitted by His Lordship to the Land Board of Hesse in order that they might Report on the same in respect to the legality of Mr. McKee's claim.
>
> These papers were before the Land Board of Hesse on 16th April 1790, but no decision was made on this application, which, it is stated in subsequent proceedings of the Board was withdrawn by Captain McKee.
>
> ...
>
> Captain McKee states in his Letter [of May 25, 1790, to Sir John Johnson] "that the intention and express purpose of the Deed of Cession to the Crown in 1784 (per 1786) of this Tract, was in Trust to him to Secure the Indians from encroachments, being convinced they would be disturbed in their possessions, which must have produced trouble between them and the White Inhabitants." – A declaration not very easy to be reconciled with the terms of the Deed, or with his own subsequent application to Lord Dorchester and to the Land Board.[82]

THE 1790 TREATY

When Governor Dorchester learned that settlement in the District of Hesse was impeded because the Indians still owned the land, he immediately began the process to purchase the area. On August 17, 1789, he instructed Superintendent Johnson to direct McKee to take a treaty with the Indians in the District of Hesse; McKee was to consult with the Land Board to determine the depth (from the river) of the tract needed for settlement, but McKee was to have authority to use his judgment in the negotiations to ensure that the Indians were satisfied with the deal:

---

[82] Report of the Council to Lieutenant Governor of Upper Canada John Colborne, regarding the Huron Reserve above the Town of Amherstburg, March 12, 1830, NA, RG 1, E1, pp. 323–27 (ICC Documents, pp. 300–4). Emphasis in original. This report included the 1786 surrender as well as correspondence and minutes from the Land Board at Hesse for the period 1790–91. The Council noted that the evidence indicated that the Huron now had the best claim to the lands once belonging to the "Lake Confederacy," but expressed concern that the Pottawatomi and the Huron had not been part of the surrender.

> ... and as it shall be found proper to treat for with the Indians consistently with their comforts, in the judgement of Mr. McKee, whom the board will be directed to settle upon the subject, and it is my desire that they be fully satisfied for what they may cede, and transfer to the Crown in the usual manner.[83]

Sir John Johnson's instructions to McKee were not included in the record.

Dorchester also instructed members of the Land Board of Hesse on September 2, 1789, to work with McKee to determine the depth of the tract, making sure they included within it all lands currently claimed by settlers:

> You will take care that all lands possessed or claimed by individuals under pretence of private purchases, or grants from Indians, on the side opposite to the port of Detroit, be comprehended within the limits of this general tract.
>
> But before any part thereof can be granted to individuals, the whole must be ceded to the Crown by the Indians. You will therefore call Mr. McKee, the Officer of the Indian Department, to your assistance in deliberating upon this subject, that you may have the advantage of His Knowledge of the temper and disposition of the Indians in ascertaining what extent of country may be proper to treat for with them, for the present, consistently with their comfort.
>
> As soon as you have determined upon this point, Mr. McKee, who is to receive instructions for that purpose from the Superintendent General of Indian affairs, will take the necessary steps to obtain from the Indians their claim and complete cession to the Crown.[84]

On December 7, 1789, the Board recommended that McKee obtain a cession of a tract "bounded by the waters of the River and Lake St. Clare [sic], Detroit [River] and Lake Erie."[85] No islands within these bodies of water were mentioned.

The surrender was signed on May 19, 1790, and minutes exist of the council with the Indians for that day. However, it is evident that the negotiations took place over a number of weeks.[86] On May 5, 1790, for example,

---

[83] Lord Dorchester to Sir John Johnson, August 17, 1789, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 32–33 (ICC Exhibit 14, document 110).

[84] Lord Dorchester to the Land Board of Hesse, September 2, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 30 (ICC Exhibit 14, document 98).

[85] Minute of Land Board of Hesse, December 7, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 6 (ICC Exhibit 14, document 113).

[86] See Victor P. Lytwyn, "Historical Research Report on British Policy Regarding the Granting of Islands in the Context of Bois Blanc (Boblo) Island in the Detroit River," March 5, 1999, note 137 (ICC Exhibit 14).

McKee reported that he had already had positive discussions about the purchase with some Indians living at a distance from Detroit and was expecting to meet with the local Indians as soon as they returned from their winter camps:

> I am but a few days returned from a tour into the Indian Country, where I went some time ago to sound and collect the Indians on the South side of the Lake, concerned in the purchase to be made from them of Land, all those, I have hitherto met with I find inclined to comply with the wish of Government. Since my return have dispatched messages to assemble those in the vicinity of this place as soon as arrived from the wintering Grounds which I now expect will be in the course of a few days.[87]

On May 14, McKee reported to the Board that the purchase would "probably be completed within a few days"[88] and, on May 18, he noted in his journal that some Huron Chiefs had just arrived at Detroit to consult with the Lake Indians "respecting the purchase of land."[89] In the same journal, he wrote that he met with the different nations on May 19 to settle some matters, after which they held their public meeting and signed the surrender:

> 19th – Finding that the Nations had not universally agreed in their Opinions respecting the Cessions, I had a meeting with them, and settled matters so that they gave their unanimous consent, and desired to have a public meeting in the Council Chambers that they may then declare their sentiments and Execute the Deed which was accordingly done.[90]

The public meeting was held at Detroit later that day. Attending for the government were Patrick Murray (the Commanding Officer of the fort), Alexander McKee, 14 named army and navy officers, as well as an unknown number of officers of the militia, magistrates, and general citizens. T. Smith, acting clerk, recorded the session. The Indians were represented by 35 Chiefs: eight Chippewa, eight Ottawa, six Potawatomi, and 13 Huron. Of those, three of the Chippewa Chiefs and one of the Ottawa Chiefs had also signed the 1786 deed/surrender (no Huron or Potawatomi Chiefs signed that deed).[91] Research conducted for the parties during the course of our inquiry concluded that the 1790 signatories represented Thames River, Pelee Island/Anderdon, Walpole Island, St Clair River, and Bear Creek (Sydenham River) regional bands "in what is now southwestern Ontario, as well as bands in what is now southeastern Michigan."[92]

---

[87] Alexander McKee, Detroit, to Lord Dorchester, May 5, 1790, PRO, CO 42, vol. 68, pp. 215–16d (ICC Exhibit 14, document 86).

[88] Minutes of the Land Board of Hesse, May 14, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 8 (ICC Exhibit 14, document 109).

[89] Extract from the journal of Indian transactions at Detroit kept by Alex McKee, Deputy Agent, May 18, 1790, NA, RG 10, vol. 45, p. 23881 (ICC Documents, p. 143).

[90] Extract from the journal of Indian transactions at Detroit kept by Alex McKee, Deputy Agent, May 19, 1790, NA, RG 10, vol. 45, p. 23881 (ICC Documents, p. 143).

At the council, Egusheway, the principal Chief of the Ottawa, spoke for all the nations and confirmed that they all agreed to the cession "according to the limits settled between us and you, and which we are all acquainted with."[93] Within the text of the treaty, the boundaries are described as follows:

> [A] certain Tract of land beginning at the mouth of Catfish Creek, commonly called Rivière au Chaudière on the North Side of Lake Erie being the Western extremity of a Tract purchased by His said Majesty from the Messesagey Indians in the year One Thousand Seven Hundred and Eighty Four and from thence running Westward along the border of Lake Erie and up the Streight [sic] to the mouth of a river known by the name of Channail Ecarté and up the main branch of the said Channail Ecarté to the first fork on the south side, then a due east line until it intersects the Rivière à la Tranche and up the said Rivière la Tranche to the North-West corner of the said cession granted to His Majesty in the year One Thousand Seven Hundred and Eighty Four, then following the Western boundary of said tract being a due South direction until it strikes the mouth of said Catfish Creek, or otherwise Rivière au Chaudière being the first offset.[94]

There is nothing in the text of the treaty to indicate that the boundary extended into the water or included any of the islands in Lake Erie, the Detroit River, or Lake St Clair.

Two areas in the ceded tract were reserved for the Indians – a small area near Sandwich and a larger block in the same place at the River Canard as described in McKee's 1786 deed. At the May 19, 1790, council, Egusheway directed his explanation of these reserves to the Huron:

> Altho we have granted the Land on the other side of the River [from Detroit] to our Father, we have not forgotten you. We always remembered Brothers, what our ances-

---

[91] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, 3–4 (ICC Exhibit 13).

[92] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, 3–4 (ICC Exhibit 13). Morrison notes in his Summary of Findings that, "While it is easy to identify each chief's Nation (such as Chippewa or Odawa), it is no simple task to identify his particular group or subdivision" (3).

[93] Minutes of Council held at Detroit with the Ottawa, Chippewa, Potawatomi, and Huron Nations, May 19, 1790, NA, RG 10, vol. 1832, p. 292 (ICC Documents, p. 120).

[94] Treaty at Detroit, May 19, 1791, Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 2, 3–4 (ICC Documents, pp. 141–42).

> tors had granted you, that is to say Brothers, from the Church to the River Jarvais, as well as a piece of Land commencing at the entry of the River Canard extending upwards to the line of the Inhabitants, and which reaches downwards beyond the River au Canard to the line of the Inhabitants. Father you have heard what I have said. I request you Father not to suffer our Brothers the Hurons to be molested. And you Brothers, the Hurons, that you will not molest our Brothers the Inhabitants.[95]

Major Murray thanked the Indian Nations for the cessions and agreed to the reservation for the Huron:

> The great King and those in office under him, in providing for the advantage of the white Inhabitants, seek not to disturb the repose of any of his Indian children; such parts therefore of the Territory which your ancestors granted the Hurons your Bretheran as you have found requisite for the general Good that they should retain is reserved for their occupation, that they may in common with the other Nations present remain under the care of a Father who is equally desirous of promoting their happiness and able to protect them from oppression.[96]

In the text of the surrender, the River Canard location is described as

> [r]eserving a Tract beginning at the Indian Officers Land at a small run near the head of the Island of Bois Blanc, and running upwards along the border of the Streight [sic] to the beginning of the French settlement above the head of the Petite Isle au D'Inde, then a due East line, Seven miles and then South so many miles as will intersect another East line run from the mouth of said Run or Gully near the head of said Island of Bois Blanc.[97]

Bois Blanc and Little Turkey islands were used as reference points to identify the larger of the two areas reserved from the surrender, but otherwise there is no other mention in the treaty of these or any other island.

The sale price of the tract was £1,200 Quebec currency, in goods. A list attached to the surrender shows that the "valuable wares and merchandise" included blankets, strouds, cloth, hats, knives, rifles, powder, shot, and other items.[98] According to McKee's journal, the Indians received these items the day after the surrender.

---

[95] Minutes of Council held at Detroit with the Ottawa, Chippewa, Potawatomi, and Huron Nations, May 19, 1790, NA, RG 10, vol. 1832, pp. 292–93 (ICC Documents, pp. 120–21).

[96] Minutes of Council held at Detroit with the Ottawa, Chippewa, Potawatomi, and Huron Nations, May 19, 1790, NA, RG 10, vol. 1832, p. 295 (ICC Documents, p. 123).

[97] Treaty at Detroit, May 19, 1791, Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 2, 3–4 (ICC Documents, pp. 141–42).

[98] Treaty at Detroit, May 19, 1791, Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 2, 3–4 (ICC Documents, pp. 141–42).

> May 20th – The Indians being again assembled, they received the Compensation to the Amount of Twelve hundred pounds Halifax Currency, in the presence of the Commanding Officer & the Officers of the Garrison
> May 21st – The Indians were employed in distributing amongst them the clothing they received yesterday
> May 22nd – I delivered them a Bullock and some Rum to make a Feast as Customary on such Occasions.[99]

Alexander McKee reported to the Land Board of Hesse on May 21, 1790, that he had successfully obtained the cession of land from the Indians according to the limits set in their resolution of December 7, 1789, except for two areas to be reserved for the Indians, one of which was "a tract beginning at the Indian officers Land running up the Streight [sic] to the French settlement and seven miles in depth."[100] McKee insisted that there would have been no surrender if he had not granted the reserve, and the minutes of a council held with the Huron on May 26, 1790, seem to bear that out.[101] The Board, however, strongly objected to the reserves, especially the larger one adjacent to the officers' grant. It was on this particular tract that the board members expected to establish George Town, as directed, and they relied primarily on McKee's May 15, 1786, deed to bolster their arguments:

> Had the Board been consulted upon the subject, more especially of the Reserve at the River au Canard, Its opinion would have been decidedly against the Derelict of what was already vested in the Crown by a Deed from the Indians of 15th May 1786 which was before the Board, on a reference from your Lordship of Mr. McKee's Petition for that Tract: not only the respectful caution which the Board would observe in not exceeding the Instructions of your Lordship would have prevented its Consent to such Reserves ... first from the Evil precedent to the Indians for counteracting their own Deeds. ...
> ... [We] earnestly entreat your Lordship to procure from the Indians an unreserved Cession of the Tract at the Riviere au Canard, if that of 1786 shall not be deemed sufficient.[102]

---

[99] Extract from the journal of Indian transactions at Detroit kept by Alexander McKee, Deputy Agent, May 18–22, 1790, NA, RG 10, vol. 45, pp. 13881–82 (ICC Documents, pp. 143–44).

[100] Alexander McKee, Detroit, to Land Board of Hesse, May 21, 1790, in Minutes of the Land Board of Hesse for May 21, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 9.

[101] Alexander McKee, Detroit, to Sir John Johnson, May 25, 1790, NA, RG 1, L4, vol. 3, pp. 306–9 (ICC Documents, pp. 146–49), and Report of Council between Major Murray, Alexander McKee, and Huron Chiefs, May 26, 1790, NA, RG 10, vol. 10028 (ICC Documents, pp. 159–60).

[102] Land Board of Hesse to Lord Dorchester, Governor, June 1, 1790, NA, RG 1, L4, vol. 2, pp. 310–13 (ICC Documents, pp. 156–61).

When this subject was discussed by the Board on May 28, 1790, two members expressed some concern. Alexander Grant thought "that all information or opinions relative to Indian affairs should proceed from the Deputy Agent."[103] Major Murray added a written dissent to the minutes, stressing that the transaction "could not have been accomplished by any means so effectual as those adopted by the agent for Indian affairs in the late Purchase."[104] Despite his objections, Murray gave his consent for the Board to forward the entire minutes to Dorchester.

Five months later, in October 1790, board member William Robertson repeated the sentiments of the majority of the Board to a Land Committee at Quebec, established to consider the "Causes of the difficulties and impediments which appear to have hitherto obstructed the progress of Settlement in that important frontier." The Committee reported Mr Robertson's testimony:

> [H]e considers the portion supposed to be reserved for the use of the Indians lying within the bounds of the tract ceded by the above mentioned Deed of the 19th of May last to have been vested in the Crown by a former Deed granted the 15th May 1786. He further says, he by no means conceives the reserve mentioned to be necessary for the Comfort of the Indians now, more that it was at the time it was ceded in May 1786, when the Indians themselves, whose property it then was voluntarily pressed it upon the Indian Agent Mr. McKee, as appears by his Memorial transmitted to the Land Board of Hesse & of which he accepted a Grant in the name & for behalf of the Crown
>
> Mr. Robertson observes that if the Tract (already the Crown's) were to be given back to the Indians, it would greatly impede the Settlement of that important Frontier by taking away the means of establishing a Fort & Garrisons at the fittest place ...[105]

The Land Committee concluded "that although with the Land Board of Hesse, they consider the tract ceded by the Indians in May, 1786, to be vested in the Crown," they understood that McKee thought it necessary to agree to the reserves in order to finalize the cession in May 1790. The Committee suggested that the Deputy Agent at Detroit be instructed to try to persuade the Huron to relinquish the land near Amherstburg, in exchange for an equal area "on the northeast shore of the entrance of Lake St. Claire."[106] The immediate problem with regard to the land for George Town seems to have been resolved by a clarification of the location of the southern boundary of the Huron Tract. In an undated memo, Major Murray cited the reasons for the reserves for the Huron and stated:

---

[103] Minutes of the Land Board of Hesse, May 28, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 11–12.

[104] Minutes of the Land Board of Hesse, May 28, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 11–12, and handwritten notes of Major Murray's dissension (ICC Exhibit 12, pp. 84–85).

[105] Transcript of the Proceedings of the Land Committee at Quebec, October 22, 1790, NA, RG 1, L1, vol. 18, p. 322 (ICC Documents, p. 165).

[106] Report of the Land Committee at Quebec, November 29, 1791, in *Report of the Department of Public Records and Archives of Ontario, 1928* (Toronto: King's Printer, 1928), p. 176. (A partial copy of this report is in ICC Documents, pp. 164–213, but the conclusion of the report is not included in that material.)

> 4. That the tract reserved does not cover the whole land granted front on the Streight but leaves near a mile between it and the Officers Grant the very spot indicated by the Engineer as a fit place for a Fort ...[107]

None of the correspondence relating to this controversy over the Huron Reserve included Bois Blanc Island, except as a reference point to fix the location of the reserve.

BOIS BLANC (BOBLO) ISLAND AFTER 1790

At various times in the years after the May 19, 1790, surrender there were numerous claims to Bois Blanc Island by both natives and non-natives. In the early years, Indians coming to collect "presents" from the Indian Department used Bois Blanc Island as a place to camp and hold their councils.[108] In July 1796, Captain Matthew Elliott was named Superintendent of Indian Affairs at Amherstburg, and the goods to be distributed to the visiting Indians were stored and distributed from his residence in the officers' grant, almost directly across from Bois Blanc Island. Later that year, when the garrison was moved from Detroit to its new location at Fort Malden (Amherstburg), the Commanding Officer complained that this arrangement was unsatisfactory. According to him, large numbers of Indians waited for a number of weeks to receive their presents, and, while waiting, were supplied with rum by the merchants who had established themselves near the garrison.[109] In 1798, Elliott was summarily dismissed as superintendent and the stores transferred to a room in the garrison.[110]

This move did not solve the problem. In 1802, the Commanding Officer at the garrison again reported that the proximity of the visiting Indians' camp ground on Bois Blanc Island to the rum merchants in the town of Malden was a problem. He suggested that the Indians should camp on the mainland in the area of reserved land north of the garrison. Thomas McKee, son of Alexander McKee, told the officer that his request must be delayed because the island was a camping place reserved for all the Indians who visited the post:

---

[107] Major Patrick Murray, undated memo, NA, MG 19, F1, Claus Papers, vol. 4, p. 229 (ICC Exhibit 14, document 84).

[108] Memorial from Ottawa, Chippewa, and Potawatomi Indians to the Lieutenant Governor of Upper Canada, September 1829, in G.M. Matheson, "Pottawatomies of Walpole Island," p. 39, NA, RG 10, vol. 121 (ICC Exhibit 9).

[109] Captain Hector McLean, Amherstburg, to Captain James Green, Military Secretary, Headquarters, Quebec, October 28, 1797, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document H38, 221 (ICC Exhibit 3).

[110] Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), cxxiv–cxxvi (ICC Exhibit 3).

> I am much concerned to delay for a moment the execution of your wishes [to remove the Indians camped on Bois Blanc Island], But knowing that this Island is Indian property, and that it was never ceded to the Crown, I think it my duty to apprise you thereof before any attempt is Made to remove them, and to inform you that when they made the last Session of Lands to the Crown they stated in their speech that this Island is expressly reserved for the encampment of their Indian Brethren.[111]

The Commanding Officer questioned the Indians' claim to the island, referring to a 1796 plan by Gother Mann which showed the island as a reservation for the Crown.[112] There is nothing on file to indicate how this problem was resolved.

At some time during this period, however, the military built a block house and sergeant's command on the island. There are no references to this installation until 1815, when the United States attempted to claim Bois Blanc Island as its own. With the retreat of General Henry Proctor in 1812, the United States had taken possession of the island.[113] When the War of 1812 ended, the local U.S. military claimed Bois Blanc Island on the grounds that the U.S. border established in 1783 ran between that island and the mainland. The Americans discounted Major Isaac Brock's Canadian claim to the island, based on "his Government having erected a Block House and kept a Sergeant's command on the Island some years since,"[114] perhaps "before the surrender of Detroit to the United States under the Treaty of 1783."[115] In 1822, this dispute was resolved in Canada's favour when the commissioners appointed according to the 1814 Treaty of Ghent established the U.S. border west of Bois Blanc Island.[116]

---

[111] Captain Thomas McKee, Petite Cote, to Lieutenant-Colonel V. Smith, May 3, 1802, and George Ironside, [Amherstburg] to Captain Thomas McKee, Sandwich, April 27, 1802, both in *Michigan Pioneer and Historical Collections* 23 (1895): 11–12 (ICC Exhibit 14, documents 88 and 89).

[112] Lieutenant-Colonel V. Smith, Amherstburg, to Major James Green, Military Secretary, Quebec, May 19, 1802, in *Michigan Pioneer and Historical Collections* 23 (1895): 12–13 (ICC Exhibit 14, document 90).

[113] Extract of letter from A.J. Baker, Washington, to Monroe, July 12, 1815, NA, RG 8, vol. 688, p. 176 (ICC Documents, p. 269).

[114] Extract of letter from Colonel A. Butler, Detroit, to Secretary of War, May 8, 1815, in NA, RG 8, vol. 688 (ICC Documents, pp. 249–51).

[115] Extract of letter from Mr Monroe, Washington, to Mr Baker, July 10, 1815, in NA, RG 8, vol. 688 (ICC Documents, p. 263).

In 1829, Ottawa, Chippewa, and Potawatomi Chiefs at Amherstburg sent a memorial to the Lieutenant Governor of Upper Canada, responding to some previous claims the Huron had made to sole ownership of the Huron Reserve and other areas associated with the surrender of May 19, 1790. In this memorial, the Chiefs stated that although they had been in the United States since the surrender, they did not "divest" themselves "of the right & possession of the disputed tract," which they claimed to have used as a camping ground on their visits. The Chiefs declared that they were about to leave the United States and wanted to "exchange" their "shares on this Indian Reserve [the Huron Reserve] & Fighting Island, for wild lands on Lake Huron."[117] Bois Blanc Island was not mentioned specifically in this memorial.

In 1836, the government constructed a lighthouse and a cottage on the south end of Bois Blanc Island and installed James Hackett as its keeper.[118] Hackett originally had a residence, outbuildings, and about 20 acres as part of the lighthouse establishment,[119] to which was added about 15 acres in July 1837.[120] He and his family were forced to leave for a short period during the 1837 Rebellion, when Patriot forces from Detroit occupied the island.[121]

The military buildings on the island were manned until the regular forces were withdrawn from Fort Malden in 1851. Some of the enrolled pensioners who acted as a reserve force at the fort also took up leases on the island (among them James Cousins, with 20 acres on the northeast corner of the island; John Bonnett, occupying the blockhouse on the western side; and Thomas Yennan, with 25 acres under cultivation at another location).[122] In June 1856, *An Act respecting the Ordnance and Admiralty Lands transferred to the Province* included the 212 acres of Bois Blanc Island as Class B lands – military properties to be retained by the provincial government for the defence of the province.[123] Various people held leases on the island until December 1866, when it was purchased by the local Member of Parliament, Arthur Rankin. Property on the island changed hands a number of times before it was eventually purchased by an American company in 1900 for the establishment of a dance pavilion and amusement park.[124]

---

[116] Decision of the Commissioners under the Sixth Article of the Treaty of Ghent, June 8, 1822, in *Report of the International Waterways Commission* (Ottawa, 1916) (ICC Documents, pp. 284–88). The Treaty of Ghent was signed on December 24, 1814 (ICC Documents, pp. 242–48).

[117] Memorial of Chippewa, Ottawa, and Potawatomi Indians to Lieutenant Governor of Upper Canada, September 1829, in G.M. Matheson, "Pottawatomies of Walpole Island," NA, RG 10, vol. 121, pp. 46–47 (ICC Exhibit 9).

[118] *Canadian Emigrant*, January 5, 1836, quoted in David P. Botsford, "The History of Bois Blanc Island," *Ontario History* 47 (summer 1955): 137 (ICC Exhibit 5).

[119] Dennis Carter-Edwards, "Fort Malden: A Structural Narrative History, 1796–1776," Parks Canada Manuscript Report No. 401, 1980, p. 273 (ICC Exhibit 4).

[120] Petition of James Hackett to Bond Head, June 12, 1837, and Order of the Executive Council, July 20, 1837, NA, RG 1, L 13, vol. 239, pp. 150–50B (ICC Documents, pp. 322–26).

[121] David P. Botsford, "The History of Bois Blanc Island," *Ontario History* 47 (summer 1955): 138 (ICC Exhibit 5).

[122] Dennis Carter-Edwards, "Fort Malden: A Structural Narrative History, 1796–1776," Parks Canada Manuscript Report No. 401, 1980, pp. 273–74 (ICC Exhibit 4).

Throughout this period, various Indian groups in the area also made claims to Bois Blanc Island. In August 1856, a Chippewa Chief, Peto-e-kee-shick, was one of the delegates from Walpole Island who travelled to England and presented a petition to Queen Victoria. Among the grievances set out in their petition was a claim for Bois Blanc Island:

> The Island near Amherstburg was not sold, it belongs to the Indians, the Objibeway Indians, of whom Peto-e-kee-shick is a chief. The soldiers of the White Government are now on this Island, some of them have built homes there. The Chief wishes to sell this Island now, as the people have cut so many trees down.[125]

Witnesses to this petition declared that they had made inquiries into the various claims, including that "the Small Island on Detroit River called Bois blanc Island, Wee-gov-bee-min-ishang, has been occupied by the military without any settlement being made for it with the Indians who are the owners," and were "unable to ascertain any facts inconsistent with the above statement of Peto-e-kee-shick."[126] There was no response to the above petition.

In that same time period, the Chippewa of Point Pelee also claimed Bois Blanc Island. In their 1858 report regarding the claims of the Huron to the reserve in Anderdon, Fighting Island, and Turkey Island, Commissioners Pennefather, Talfourd, and Worthington reported that the island had never been surrendered:

> Bois Blanc Island opposite the Town of Amherstburg is not claimed by this Tribe [Hurons], has never been surrendered to the Crown but is designated as Ordnance land, the Chippewas of Point Pelee have however asserted their right to it. A search in

---

[123] *An Act respecting the Ordnance and Admiralty Lands transferred to the Province*. June 19, 1856, 22 Vict., c 24, pp. 293 and 297 (ICC Documents, pp. 349 and 353).

[124] Foley & Daley Associates, "Walpole Island First Nation Claim to the Island of Bois Blanc (Bob Lo)," revised September 1993, p. 56 (ICC Exhibit 6), and David P. Botsford, "The History of Bois Blanc Island," *Ontario History* 47 (summer 1955): 138 (ICC Exhibit 5).

[125] Petition Relative to the Islands and Lands claimed by the Walpole Island Indians in the Western District, August 22, 1856, NA, RG 10, vol. 398 (ICC Documents, p. 356).

[126] Petition Relative to the Islands and Lands claimed by the Walpole Island Indians in the Western District, August 22, 1856, NA, RG 10, vol. 398 (ICC Documents, pp. 356–60).

> the old Records of the Indian Office has shown us that this Island was formerly considered as Indian property held in common by the Wyandots, Chippewas, Ottawas and Pottawatomies, as a Camping Ground and place of Council. The Ordnance vesting Act having placed it in the same category as Fighting Island, it will be for Your Excellency to decide what compensation may be due to the Tribes remaining on the English side of the River, if it taken possession of by the Government under this Title.[127]

Again, there is no correspondence in response to this statement.

On August 5, 1867, the Ottawa, Chippewa, and Potawatomi of Walpole Island petitioned the Governor General with claims to the Huron Reserve in Anderdon, Fighting Island, and Bois Blanc Island. They declared themselves to be descendants of the Ottawa, Chippewa, and Potawatomi "who formerly displayed loyalty to the British Government ... [who were] the rightful proprietors of the Peninsula between Lakes Huron, St. Clair and Erie."[128] According to them, the Chippewa had moved to other tracts of land along the St Clair River, while the Ottawa and Potawatomi had gone back to the United States, where they had wandered and hunted throughout the unsettled territory and the state of Michigan. They had done so without "any intention of forever abandoning the Land and the Islands reserve by them [along the Detroit River]," but, since about 1837, they had all returned and settled at Walpole Island.[129] The petitioners recounted that they had periodically consulted the local Indian agent (who told them that no action could be taken because of the length of time intervening), and that they had held two councils with the Huron, where they unsuccessfully tried to negotiate shared ownership. According to the petition, the islands, including Bois Blanc, belonged to the Ottawa, Chippewa, and Potawatomi alone and they wanted them to be disposed of for their benefit:

> 9. That the Islands respectively called Fighting and Bois Blanc both in the River Detroit and vicinity of the said Huron Reservation – but not wholly in front of that Reserve were owned and held in common at an earlier date by the said Chippeway, Potawatomy and Ottawa Nations only and in consequence were not included in the Territory so ceded.
>
> [No.10 protests Huron surrender of Fighting Island.]

---

[127] Extract from report of Commissioners Pennefather, Talfourd, and Worthington, 1858, in G.M. Matheson, "Pottawatomies of Walpole Island," NA, RG 10, vol. 121, p. 148 (ICC Exhibit 9)

[128] Memorial of Chippewa, Ottawa, and Potawatomi Nations of Walpole Island, August 4,1867, NA, RG 10, vol. 325, pp. 21796–71 (ICC Documents, pp. 448–50)

[129] Memorial of Chippewa, Ottawa ,and Potawatomi Nations of Walpole Island, August 4,1867, NA, RG 10, vol. 325, pp. 217969–70 (ICC Documents, pp. 448–49)

> 11. That the Bois Blanc Island which was for many years used for landing and camping purposes and place of Council have never been surrendered and as it title belongs to your Memorialists they now come to offer to surrender it to be disposed of for their own benefit.[130]

William Fisher, a Walpole Island band member and interpreter, forwarded the petition on November 14, 1867, adding: "My people have repeatedly told me that the Bois Blanc Island had never been surrendered and thus cannot be sold without the proprietors are first consulted."[131] A notation on the file cover for the above correspondence indicates that research had found the May 15, 1786, deed and, according to the unnamed author, this document extinguished rights to the island for the Ottawa and Chippewa, but not the Potawatomi or Huron:

> Bois Blanc Island in the Detroit River is not embraced by the Surrender made by the Indians in the year 1793 [sic] of the Territory bordering on Lake Erie and the Detroit River & it would seem that in consequence of a Block House having been at one time erected upon it included in the Schedule of lands attached to the Ordnance Vesting Act and it is stated in the Special Commrs Report of 1858 that it never was surrendered to the Crown. I find however upon examining an old Surrender dated 15 May 1786 it was included therein but no Payments in consideration therefore were described. The only parties to the surrender made in 1786 with the Ottawas & Chippewas & having accordingly the claims of the Pottawatomies & Hurons thereto unextinguished and as valid now as at any former time. This claim or right extends also to the Reserve Seven miles Square set apart and preserved to the Indians by the Treaty of May 1790 which returned Reserve now constitutes the Township of Anderdon.[132]

In 1870, the Walpole Island Indians again petitioned the government regarding these lands. This time, Senator Walter McCrea forwarded their petition with his strong endorsement as to its validity:

> Then as to Bois Blanc Island, there is no doubt it never was ceded by the Indians and even if the Government sold it to Mr. Rankin as Ordnance Lands, no longer useful for such purposes I presume, they should first have extinguished the Indian claims to it. I should say rather that when the Government found it no longer required for Ord-

---

[130] Memorial of Chippewa, Ottawa, and Potawatomi Nations of Walpole Island, August 4,1867, NA, RG 10, vol. 325, pp. 217972 (ICC Documents, p. 451).

[131] William L. Fisher to Superintendent General of Indian Affairs, November 14, 1867, NA, RG 10, vol. 325, p. 217965 (ICC Documents, p. 457).

[132] Notation on file cover, author not identified, no date (c. November 16, 1867), NA, RG 10, vol. 325, C446, No. 221, p. 217968 (ICC Documents, pp. 446–47).

> nance purposes, they should have surrendered it to the Indians and then treated with them for the purchase thereof.
>
> ...
>
> ... I believe they have a just and fair claim to a reasonable compensation for the surrender of their claims to the four Islands mentioned in the Memorial, and as the Government has chosen to grant these Islands, it is to the Government they have a right to look for that compensation and not to the grantees, who may, or may not, be responsible parties at all.[133]

Joseph Howe, the Secretary of State for the Provinces and head of the Indian Department, responded by sending the Senator abstracts from various reports on the Walpole Island claims, "from the concluding portions of which you will observe that the matter was disposed of by my predecessor and that it was to be regarded as finally settled."[134] Among the abstracts in Howe's letter was one from a March 1869 report by the Deputy Superintendent General of Indian Affairs which concluded that the islands in the Detroit River were not included in the May 19, 1790, cession, but "[u]nder date of 15 May 1786, Bois Blanc Island in the River Detroit together with a tract on the Mainland seven miles square was surrendered to the Crown by the Chippewas & Ottawas."[135]

In an interview with departmental officials late in 1895, Chief Robert Caldwell claimed Bois Blanc Island, among others. He was told that it was surrendered by the Ottawa and Chippewa on May 15, 1786.[136] Then in May 1899 a nearly identical version of the1870 petition mentioned above was sent to the Governor General, to which there was no response.[157]

---

[133] Copy of letter from W. McCrea to Joseph Howe, Secretary of State for the Provinces and Superintendent of Indian Affairs, March 3, 1870, in NA, RG 10, vol. 10028 (ICC Documents, pp. 487–90). The memorial (the wording of which is almost identical to the one submitted in 1867) is dated February 8, 1870, and is in NA, RG 10, vol. 598, pp. 256–61 (ICC Documents, pp. 470–86).

[134] Copy of Letterbook entry, Joseph Howe to Hon. Walter McCrea, Senator, April 4, 1870, in G.M. Matheson, "Pottawatomies of Walpole Island," NA, RG 10, vol. 121, pp. 158–64 (ICC Documents, pp. 491–97).

[135] Abstract from report of Deputy Superintendent General's Report, March 9, 1869, in G.M. Matheson, "Pottawatomies of Walpole Island," NA, RG 10, vol. 121, p. 159 (ICC Documents, p. 492).

[136] Memo [Hayter Reed, Deputy Superintendent General of Indian Affairs], January 3, 1896, NA, RG 10, vol. 2043, file 8996, pt 3 (ICC Documents, pp. 574–83).

[157] Copy of Memorial of Chippewa, Ottawa, and Potawatomi Indians of Walpole Island, May 30, 1899, NA, RG 10, vol. 787, pp. 12–30 (ICC Documents, pp. 619–30).

PART III

ISSUES

At a pre-hearing conference held on January 28, 1999, the parties agreed to seven main issues. Before outlining them, we note that the disposition of the first issue addresses some of the questions raised in the other issues. We have attempted to deal with the various points raised by counsel for each party where appropriate in our analysis. As such, we did not find it necessary to deal with every issue raised.

The issues agreed to by the claimant and Canada were as follows:

1 Does the Surrender of May 15, 1786, contravene the provisions of the *Royal Proclamation of 1763*?

2 (a) Were the Chiefs and principal men of the Walpole Island First Nation signatories to the alleged surrender of May 15, 1786?

(b) If they were not, does this make the surrender invalid with respect to the Walpole Island First Nation?

3 Was there consideration for the transfer?

4 If there was not, does this render the surrender invalid?

5 (a) Did the Crown and/or Indians regard the surrender of 1786 as invalid when they entered into the surrender of 1790?

(b) If so, what is the effect of the 1790 surrender on the alleged surrender of 1786?

6 Is the Crown estopped from relying upon the surrender of 1786?

7 Did the Crown breach its fiduciary obligations in obtaining the surrender?

We will address these issues in the following section of the report.

PART IV

ANALYSIS

On May 15, 1786, Alexander McKee, the Deputy Superintendent of Indian Affairs, proceeded to get a surrender of lands from certain chiefs of the Ottawa and Chippewa Nations. These lands extended for seven miles, including the mouth of the Detroit River as well as Bois Blanc Island. Much of our analysis turns on the question of whether this surrender was legally valid.

The question to determine first is whether the 1786 surrender conformed to the protocol of the *Royal Proclamation of 1763*. If it did, the surrender is valid. If it did not, we must determine whether this unconformity renders it invalid.

ISSUE 1 DOES THE SURRENDER OF MAY 15, 1786, CONTRAVENE THE PROVISIONS OF THE ROYAL PROCLAMATION OF 1763?

The Walpole Island First Nation argues that the 1786 Surrender was invalid for three main reasons:

1. The surrender was contrary to the *Royal Proclamation of 1763* because the lands were not "purchased."

2. The true intent of those First Nations who signed the 1786 Surrender was to reserve or preserve those lands for the use and benefit of First Nations.

3. The 1790 Surrender was intended to supersede and replace the 1786 Surrender.[138]

---

[138] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 4

Before we can address the first of the claimants' submissions, we must address a preliminary argument raised by Canada to the effect that the *Royal Proclamation of 1763* does not apply within the territory at issue.

Applicability of the *Royal Proclamation*

The Walpole Island First Nation argues that as early as July 9, 1754, the private purchases of Indian lands for "small and trifling considerations" were discussed by the British Crown, and that, to avoid uneasiness, it was recommended that all such purchases in future should be void.[139] The First Nation points to the *Royal Proclamation of 1763*, which required that the disposition or purchase of Indian lands take place at a public or general meeting.[140]

Canada's position, by contrast, is that the *Royal Proclamation* did not apply in the circumstances, or, alternatively, that it did not apply geographically to Boblo Island.[141] This argument is reflected in the following submission:

> It is Canada's submission that the Royal Prerogative [sic] does not apply to Boblo Island because it was not within those lands where it was thought proper to allow settlement. The claimant provides no evidence that the Royal Proclamation applies to Boblo Island. In *Bear Island Foundation* v. *A.G. Ontario et al* (1989) 58 DLR (4th) 117 (Ont. C.A.), the Court held at 133 that:
>
>> It is at least questionable whether these provisions affected the Temagami lands since they may not have been "*within those parts of our Colony where We have thought proper to allow settlement.*"[142]

In essence, Canada, relying on the case of *Ontario (A.G.) v. Bear Island Foundation*,[143] argues that, as Boblo Island was not intended for settlement, the *Royal Proclamation* did not apply.

In our view, Canada's submission interprets the *Bear Island* decision somewhat out of context. The *Royal Proclamation* excluded the Hudson's Bay Company territory,[144] which was bounded by the "height of land" as its northern extremity.[145] One of the issues in *Bear Island* at trial was whether the *Royal Proclamation* applied to the geographical area *north* of the height of land where the territory at issue in that case was located, an issue the Ontario Court of Appeal found unnecessary to address in light of its overall findings. It is noteworthy, however, that the trial judge, whose findings were not interfered with in this respect, found as a fact that the *Royal Proclamation* applied to the lands south of the height of land.[146] The passage cited by Canada from the Ontario Court of Appeal in *Bear Island*, then, is *obiter*, and was, in any event, made in the context of considering the territorial applicability of the *Royal Proclamation* in northern, not southern, Ontario.

---

[139] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 13.

[140] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 15.

[141] Submission on Behalf of the Government of Canada, March 22, 1999, paragraphs 3 and 4.

[142] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 33. Emphasis added.

[143] See *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73 at 77–78.

[144] *Royal Proclamation*, October 7, 1763 (ICC Documents, pp. 25–32).

[145] The Royal Charter incorporating the Hudson's Bay Company, A.D. 1670, in Bernard W. Funston and Eugene Meehan, eds., *Canadian Constitutional Documents Consolidated* (Scarborough, Ont.: Carswell Publishing, 1994).

However, the suggestion that Canada asks us to accept is that surrenders would be required under the terms of the *Proclamation* only in lands where settlement was to occur. We do not agree. The *Proclamation* applied to the Indian Territory, a territory which was defined geographically within the *Proclamation* in terms that clearly included southern Ontario.[147] Lands in southwestern Ontario have been held to be subject to the *Royal Proclamation*.[148] The *Proclamation* applied wherever Indian lands were to be obtained by the Crown. The Detroit River/Lake St Clair region, where this claim arises, unquestionably fell within the vast area reserved by the *Royal Proclamation* for Indian use.[149]

As noted in Part II, even before 1763, the British had recognized that the purchase of Indian lands had to be regulated to prevent the increasing loss of Indian allies to the French. Representatives of the British Colonies met in a general council at Albany, New York, in 1754 to discuss these and other problems that had developed with the Indians. One of the causes was identified to be the purchase of lands from Indians by individuals for "trifling consideration":

> That purchases of lands from the Indians by private persons for *small trifling considerations, have been the cause of great uneasiness and discontents*, and if the Indians are not in fact imposed on and injured, yet they are apt to think that they have been and indeed they appear not fit to be intrusted at large with the sale of their own lands, and the Laws of some of the Colonies which make such sales void, unless the allowance of the Govern^{t} be first obtained, seem to be well founded. ...

---

[146] *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73 at 77–78.

[147] *Royal Proclamation*, October 7, 1763 (ICC Documents, pp. 25–32).

[148] As held most recently in the *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406 at 188 (Gen. Div.).

[149] Douglas Leighton, *The Historical Development of the Walpole Island Community*, Occasional Paper No. 22 (Wallaceburg: Walpole Island Research Guide, 1986), 15–16.

> That all future purchase of lands from the Indians be void unless made by the Govern^{t} where such lands lye, and from the Indians in a body in their public councils.[150]

On October 7, 1763, King George III issued the *Royal Proclamation* to formalize all previous instructions and policies and to establish some rules for the management of the Indian territory. The Walpole First Nation submits that the requirements of the *Royal Proclamation* were conveyed specifically to the ancestors of the First Nation in September 1765 at a meeting at the "crooked place" (Niagara) between Sir William Johnson, the Superintendent General of Indian Affairs, and these ancestors, as set out in a report prepared by Dr Victor Lytwyn.[151]

We do not find that the Lytwyn report provides sufficient information to reach the conclusion that the provisions of the *Royal Proclamation* were communicated to the ancestors of the First Nation. However, for applicability of the *Royal Proclamation,* it is not necessary to find that actual notice of its contents was provided. As we will discuss further in our report, the policy was binding on the Crown's representatives, and the valid surrender of lands required compliance with its provisions. As the trial judge held in the *Chippewas of Sarnia Band v. Canada:*

> This private sale of unsurrendered Indian land was the very thing prohibited then and now by the common law of Indian title, confirmed by the *Royal Proclamation of 1763* and by recent judgments of the Supreme Court of Canada. The overwhelming weight of judicial authority including the Court of Appeal judgments in *Shawanaga* and *Kettle and Stony Point* establishes that the common law surrender requirements reflected in the *Royal Proclamation* were fully in force at all material times. Sale of Indian land was strictly prohibited unless purchased by the Crown, in the name of the Crown, at some public meeting of the Indians assembled for that purpose by the Governor or his equivalent ... Quite apart from the *Royal Proclamation* these elements of Indian title at common law were reflected in the invariable Crown practice of the times by the actions and statements and legal opinions of Indian Department officials and governors and law officers of the Crown including the Attorney General ...[152]

---

[150] Report to Council, July 9, 1754, in E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New-York*, 15 vols. (Albany, NY: Weed, Parsons & Co., 1856–87), 6: 888 (ICC Documents, p. 8). Emphasis added.

[151] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 16, citing Victor P. Lytwyn, "Historical Research Report on British Policy Regarding the Granting of Islands in the Context of Bois Blanc (Boblo) Island in the Detroit River," pp. 4, 13, 15.

[152] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] OJ No. 1406 at 188 (Gen. Div.).

We therefore reject the Crown's submission that the *Royal Proclamation of 1763* did not apply in the circumstances.

Requirements of the *Royal Proclamation*

According to the *Royal Proclamation*, when lands were required by the Crown, certain preconditions had to be met. As the *Proclamation* itself stated:

> We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, *without Our especial Leave and Licence for the Purpose first obtained.*
>
> We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, *the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colonies* ...[153]

Instructions sent to Governor James Murray in December 1763 confirmed that

> Whereas We have, by Our Proclamation dated the seventh day of October in the Third year of Our Reign, strictly forbid, on pain of Our Displeasure, all Our Subjects from making any Purchases of Settlements whatever, or [illegible]ng Possession of any of the Lands reserved to the several Nations of Indians, with whom We are connected, and who live under Our Protection, *without Our especial Leave for that Purpose first obtained*; It is Our express Will and Pleasure, that you take the most effectual Care that Our Royal Directions herein be punctually complied with, and that the Trade with such of the said Indians as depend upon your Government be carried on in the Manner and under the Regulations prescribed in Our said Proclamation.[154]

In January 1764, William Johnson informed the Six Nations of the land provisions of the *Royal Proclamation*:

---

[153] *Royal Proclamation*, October 7, 1763 (ICC Documents, pp. 29–31). Emphasis added.

[154] Instructions to James Murray, December 7, 1763, in *Third Report of the Bureau of Archives for the Province of Ontario for1905* (Toronto: King's Printer, 1906), lx (ICC Exhibit 14, document 18). Emphasis added.

> You need be under no Apprehensions concerning your Lands or Possessions after what I have lately informed you of his Majestys Royal Proclamation, commanding that no Lands whatsoever should be taken from you, nor any Purchase attempted to be made, but with your Consents *in a public Meeting of each Nation*; and as I am getting Copies of that Proclamation printed, so soon as they are ready, I shall send one to your Nation (as well as to the rest) for your satisfaction on that head.[155]

The binding nature of the *Proclamation* is apparent from the historical correspondence placed before us. In April 1771, General Thomas Gage, Commander-in-Chief of the British forces at New York, wrote a letter to the Commander at Detroit stating that all previous grants, whether to the French or the British, were to be voided where they had been made without the King's permission and authority:

> ... I am to explain to you that the King has not invested any Person whatever with the power of granting Lands in America, except to his Governors, within the limits of their respective Provinces & under certain forms and restrictions, *and where any Purchase is made of the Indians tho' within the limits of the Provinces they are not valid, unless permission is given so to do & the purchase made in presence of the Governor & His Majesty's Superintendent of Indian Affairs. From hence you will know the power of granting Lands at Detroit remains solely in the King & that no Purchase can be made of the Indians but with the King's permission & authority.*[156]

In 1776, Governor Henry Hamilton declared that "it would be impossible for him to act contrary" to the stipulations in the 1763 *Proclamation*."[157] Governor Haldimand wrote to Lieutenant Governor Hay in 1784 confirming again that

> ... the claims of individuals, without distinction, upon Indian Lands at Detroit, or any other part of the Province are INVALID, and the mode of acquiring lands by what is called Deeds of Gift, is to be entirely discountenanced, for *by the King's instructions*, no private Person, Society, Corporation, or Colony, is capable of acquiring any property in lands belonging to the Indians, either by purchase of, or grant of conveyance from the said Indians, excepting only where the lands lye within the limits of any

---

[155] Speech dated January 20, 1764, by Sir William Johnson to the Six Nations, in James Sullivan et al., eds., *The Papers of Sir William Johnson*, 14 vols. (Albany, NY, 1921–65), 11: 30–31 (ICC Exhibit 14, document 20). Emphasis added.

[156] General Gage, New York, to Commander at Detroit, April 8, 1771, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document C17, 64–65 (ICC Exhibit 12, pp. 2–3). Emphasis added.

[157] Diary [of Jehu Hay, Deputy Indian Agent, Detroit], June 13, 1776, and July 7, 1776, NA, MG 19, F35, series 1, lot 687, pp. 53 and 64–65 (ICC Exhibit 14, document 48).

> colony ... *no Purchase of Lands belonging to the Indians, whether in the name or for the use of the Crown, or in the name or for the use of Proprietaries of Colonies be made, but at some general meeting at which the Principal Chiefs of each Tribe claiming a proportion in such lands are present;* and all tracts so purchased must be regularly Surveyed by a Sworn Surveyor in the presence and with the assistance of a Person deputed by the Indians to attend such Survey, and the said Surveyor shall make an Accurate Map of such Tract, describing the Limits, which map shall be entered upon the Record with the deed of conveyance from the Indians.[158]

The provisions of the *Royal Proclamation*, then, formed the policy that governed surrenders of land by aboriginal peoples to the Crown at the time. Any failure to comply with its provisions rendered surrenders invalid. Specifically, while it does not appear that His Majesty's permission, or leave[159] and licence,[160] to achieve surrenders meant that permission had to be obtained directly from the King, it does seem that such instructions were required to be obtained at least from the Governor or the Superintendent of Indian Affairs. Once instructions to obtain a surrender were received, it was necessary to hold a general assembly or "publick meeting"[161] of the principal chiefs of each tribe claiming an interest in the subject lands,[162] at which time lands could be purchased. The Governor, the Superintendent of Indian Affairs,[163] or the Commander in Chief were required to be present at the assembly.

Applying these requirements to the 1786 surrender, we have reached the following conclusions.

Instructions, Licence, or Permission to Obtain a Surrender

The historical record does not disclose any instructions to Alexander McKee from any of his superiors to obtain the May 15, 1786, surrender. Nor does it appear that he sought permission, leave, or licence to do so.

---

[158] General Frederick Haldimand to Lieutenant Governor Hay, April 26, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), G5, 157–58 (ICC Documents, pp. 92–93). Emphasis added.

[159] Instructions of James Murray, December 7, 1763, paragraph 62, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), lx (ICC Exhibit 14, document 18).

[160] *Royal Proclamation*, October 7, 1763 (ICC Documents, p. 30).

[161] Speech dated January 20, 1764, by Sir William Johnson to the Six Nations, in James Sullivan et al., eds., *The Papers of Sir William Johnson*, 14 vols. (Albany, NY, 1921–65), 11: 30–31 (ICC Exhibit 14, document 20).

[162] General Frederick Haldimand to Lieutenant Governor Hay, April 26, 1784, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document G5, p p. 157–58 (ICC Documents, pp. 92–93).

[163] General Gage to the Commander at Detroit, April 8, 1771, in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), Document C17, pp. 64–65 (Exhibit 12, 2–3).

On May 13, 1789, Lord Dorchester had ordered that a township be laid out opposite the Isle of Bois Blanc, to be called George Town, following the satisfaction of any claims on the part of the Indians.[164] On August 14, 1789, the Land Board of Hesse noted that it was informed by McKee that the land "has never yet been bought from the Indians for the use of the crown and that *he has no instructions from Sir John Johnson*, the Superintendent-General, on that head, but that the Indians have actually divested themselves of that land by deed bearing date 7 June 1784 ... in favour of certain officers and others who served with them during the war."[165]

The failure to obtain instructions had not prevented McKee from taking a grant of lands, along with other Indian officers, in 1784 for his own purposes, a grant that clearly violated *Proclamation* protocol. As well, a 1859 case filed with us, that of *R. v. McCormick*, indicates that McKee may have taken possession of another island, Point au Pelee Island, without a proper surrender. In that case, the court was asked to determine the ownership of the island, which had passed from Alexander McKee to his son, Thomas, and from there to third parties. As stated therein by Robinson J:

> This case brings up an important question, and one which cannot, I think, be quite satisfactorily disposed of without our knowing whether the Crown had ever in any manner exercised any act of ownership over Point au Pele Island and whether it had been acquired by purchase from the aboriginal Indian tribe to which it had belonged.
>
> ...
>
> For anything that appears, this island may have been regarded and treated by the Crown as Indian land, in which the right of the natives had not been extinguished, though it is by law part of the township of Mersea.[166]

In contrast to the 1786 surrender, McKee had clear instructions to enter into the 1790 surrender. As soon as Lord Dorchestor learned that settlement in the District of Hesse was impeded because the Indians still owned the land, he immediately began the process to purchase it. On August 17, 1789, he instructed Superintendent Sir John Johnson to direct McKee to enter into a treaty with the Indians in the District of Hesse. McKee was to consult with the Land Board to determine the depth from the river of the land needed; however, he was to use his judgment in the negotiations to ensure that the Indians were "fully satisfied for what they may cede, and transfer to the Crown in the usual manner."[167] On September 2, 1789, Lord Dorchester instructed the Land Board at Hesse to ensure that a proper site was chosen on the east side of the Straight of Detroit for a county town, preferably opposite the Island of Bois Blanc. Before McKee could act, however, Dorchester advised him to take the necessary steps to obtain a cession to the Crown from the Indians.[168] Specifically, McKee was to use his

---

[164] Lord Dorchester, Quebec, to Major Close, May 13, 1789, quoted in Proceedings of the Land Committee at Quebec, December 3, 1790, NA, RG 1, L1, vol. 18 , p. 323 (ICC Documents, p. 166).

[165] Minutes of the Land Board of Hesse, August 14, 1789, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 3 (ICC Exhibit 14, document 94). Emphasis added.

[166] (1859) 22 Vic 131 Queen's Bench, Easter Term at 133 and 136 (ICC Exhibit 12, pp. 133 and 136).

> ... knowledge of the temper and disposition of the Indians, in ascertaining what extent of Country it may be proper to treat for with them for the present, consistently with their comfort.
>
> As soon as You have determined upon this point, Mr. McKee, who is to receive Instructions for that purpose from the Superintendent General of Indian Affairs, will take the necessary steps to obtain from the Indians their clear and complete cession to the Crown.[169]

The validity of the 1790 cession has not been challenged by either Canada or the Walpole Island First Nation.

General Meeting or Assembly with the Principal Chiefs

The May 15, 1786, surrender was issued by the "principal village and war Chiefs of the Ottawa and Chippewa Nations of Detroit" to the Crown "for and in consideration of the goodwill, friendship and affection which we have for Alexander McKee."[170] In 1830, the Executive Council of Upper Canada, in the course of its investigation into which First Nations were required to surrender the Huron Reserve above Amherstburg, reviewed the 1790 minutes of the Land Board of Hesse. These minutes included a description of the 1786 surrender. The Executive Council noted with some concern that neither the Potawatomi nor the Huron had been present during the 1786 cession, even though the Huron were occupying part of the tract:

> On the 15th May 1786 the Ottawa and Chippewa Nations made a Cession of this Tract to His Majesty – *It is remarkable that neither the Pottawatomies nor Hurons are*

---

[167] Lord Dorchester to Sir John Johnson, August 17, 1789, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 32–33 (ICC Exhibit 14, document 110).

[168] Lord Dorchester, Quebec, to Land Board for the District of Hesse, September 2, 1789, NA, RG 1, L4, vol. 2, p. 237 (ICC Documents, p. 101).

[169] Lord Dorchester, Quebec, to Land Board for the District of Hesse, September 2, 1789, NA, RG 1, L4, vol. 2, p. 237 (ICC Documents, p. 101).

[170] Surrender No. 116, May 15, 1786, in Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 116, 272 (ICC Documents, p. 94).

> *parties to this Cession and that no Notice is taken of their Interest, or of the fact that the Huron were occupying a part of the Tract* – It is stated in this Deed that the Cession to His Majesty was made in consideration of the friendship of the Nations for Alexander McKee. The use afterwards attempted to be made of this Deed of Cession by Captain McKee. Naturally leads to the conjecture that *he was desirous of extinguishing the claims of the two Nations making it, and that he relied upon being able to gain the separate assent (or perhaps had gained the assent) of the Hurons, who as they resided in the District were always accessible.* Why the Pottawatimies were not required to concur does not appear – They perhaps had not any Interest in the Lands Ceded ...[171]

If McKee relied on getting the separate assent of the Huron later to a surrender of Bois Blanc Island, he did not, in fact, do so, and the 1790 surrender, which included representatives of the Huron and Potawatomi Nations, does not include Bois Blanc Island. We are not therefore satisfied that each tribe with an interest in the lands in question was represented at the 1786 surrender meeting by its principal Chiefs. Later in our analysis, we will address the question of whether the 1786 surrender might nonetheless evidence the "clear and plain intention of the sovereign" to extinguish the rights of those tribes not present at the surrender.

Purchase of Lands

The 1786 surrender did not involve the payment of money, instead being based on the "friendship and affection" for McKee held by the principal village and war Chiefs. The Walpole Island First Nation submits that goodwill, friendship, and affection do not constitute adequate consideration for a surrender of Indian lands, given the fiduciary relationship between the Crown and the Indian Nations, and in light of the *Royal Proclamation* itself.[172] Similarly, the First Nation argues that the 1786 surrender was invalid, in that the *Royal Proclamation* was intended to prevent exploitative bargains ("past frauds and abuses") and that the 1786 deed is, on its face, both unconscionable and exploitative.[173]

If the *Royal Proclamation* applies, which Canada denies, Canada argues in the alternative that there was no contravention of the *Proclamation* at all.[174] Canada argues that the word "purchase" in the *Proclamation* does not require monetary consideration: to support this argument, Canada relies on a definition in the 1874 *New Law Dictionary*[175] and on the contention that the Crown provided adequate consideration in the circumstances[176] in the form of good will.[177]

---

[171] John B. Robinson, Executive Council, to Lieutenant Governor of Upper Canada, March 12, 1830, NA, RG 1, E1, 321–33 (ICC Documents, pp. 300–1). Emphasis added.

[172] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 96.

[173] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraphs 93–94.

[174] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 38.

As we have already noted, one of the reasons for the Crown policy was the need on the part of the Crown to avoid situations in which Indians were deprived of their lands on the basis of "trifling consideration." The historical record indicates that a surrender of lands required genuine consideration, and that, in most instances, this practice required an actual purchase of lands. For example, in April 1765, the four Indian nations around Detroit complained that they had not *sold* their lands: the Huron stated that they had not *sold* lands near Detroit to the French, and the Chiefs of the Ottawa, Chippewa, and Potawatomi asserted that they had not *sold* them either but that they were willing to give up the land "*provided they were paid for it*."[178] The expectation, then, seems clear that, if lands were to be surrendered, the Chiefs expected something in return.

By way of further example, the Land Board at Hesse was concerned to learn from McKee that none of the lands in Hesse had been *purchased* from the Indians for the Crown, but that the Indian officers in fact occupied the entire space opposite to the Isle Bois Blanc by special promise from the Indians.[179] A letter from the Board dated August 28, 1789, indicated that McKee had informed it earlier that "none of the lands within the limits of the district have been *purchased* from the Indians for the Crown, although they have been parcelled out in large grants to individuals by the natives, so as to leave none unclaimed from Long Point on Lake Erie to Lake Huron." "[P]resuming on the constant practice of the Crown, to *purchase* the right of soil," the Land Board postponed the settlement of the lands until the "right of soil" could be determined.[180]

In light of the overall evidence, we do not accept Canada's argument that the 1786 surrender could be valid on the basis of the Indians' friendship and affection for McKee alone, particularly given the prohibition against surrenders to individuals. We note that the 1784 grant to the Indian officers was clearly considered invalid by the Land Board at Hesse primarily on the basis that no "purchase" had occurred, despite the obvious friendship and affection held by the aboriginal signatories to that grant for the Indian officers. One possible explanation for the failure of consideration is that McKee had no authority to enter into the transaction, and could not therefore commit his superiors to the provision of supplies or monetary consideration.

---

[175] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 38.

[176] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 4.

[177] Submission on Behalf of the Government of Canada, March 22, 1999, paragraphs 56–63

[178] Journal of George Croghan, September 4, 1765, NA, MG 11, CO 323, vol. 23, p. 10 (ICC Exhibit 14, document 32).

[179] Minutes of the Land Board of Hesse, August 14, 1789, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 3 (ICC Exhibit 14, document 94).

[180] Land Board of Hesse to Governor Dorchester, August 28, 1789, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 28 (ICC Exhibit 14, document 97).

Canada argues that monetary consideration was not required under the terms of the *Royal Proclamation*. Canada also argues that, in any event, adequate consideration had been provided.[181]

We agree that monetary consideration is not necessary for a surrender to be valid. A promise of protection for hunting and fishing activities by the Crown, for example,[182] may be adequate consideration for a land cession; the provision of presents is certainly enough. However, we find that there must be actual consideration, and, in light of the other serious questions raised as a result of McKee obtaining the surrender without instructions, we find that something more than the mere expression of friendship and affection is required in this particular case.

We note that, when McKee finally obtained a valid surrender of the mainland tract in 1790, consideration in the form of actual goods was provided to the Indian nations who participated. This consideration was identified in the treaty text itself as "the Sum of Twelve Hundred Pounds Currency of the Province of Quebec ... for valuable Wares and Merchandise,"[183] and was outlined on an attached list described as including blankets, strouds, cloth, hats, knives, rifles, powder, shot, and other items valued at £1,200.[184] As McKee reported in 1790:

> May 20th – The Indians being again assembled, they received the Compensation to the Amount of Twelve hundred pounds Halifax Currency, in the presence of the Commanding Officer & the Officers of the Garrison.
>
> May 21st – The Indians were employed in distributing amongst them the Clothing they received yesterday.

---

[181] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 4.

[182] See *R. v. Ireland*, [1990] 1 OR (3d) 577 (Gen. Div.). See also *R. v. Jones and Nadjiwon*, [1993] 14 OR (2d) 421 (Prov. Div.).

[183] Surrender No. 2, May 19, 1790, in Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 2, 1 (ICC Documents, p. 140).

[184] Surrender No. 2, May 19, 1790, in Canada, *Indian Treaties and Surrenders* (1891, reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no.2, 3–4 (ICC Documents, pp. 141–42).

> May 23rd – I delivered them a Bullock and some Rum to make a Feast, as Customary on such Occasions ...[185]

Assembly in the Presence of High Officials

There is no evidence before us one way or the other to indicate whether a public assembly or meeting of the type contemplated in the *Royal Proclamation* was held in 1786. Nine Chiefs signed the document. The three Crown witnesses to the surrender are not identified by rank or position. From their names, however, it is apparent that the Governor, Commander in Chief, and/or Superintendent of Indian Affairs were not among them.

By contrast, McKee stated that on May 19, 1790, he had a meeting with all parties and had settled matters so that they gave their unanimous consent and desired to have a public meeting in the Council Chambers to declare their sentiments.[186] The 1790 treaty involved 35 Chiefs identified as representing all four Indian nations claiming an interest in the lands, as well as nearly 20 witnesses and Crown representatives, including Major Murray, the Commanding Officer at Detroit.[187]

Comparison of the 1786 and 1790 Surrenders

Comparisons and disparities between the two surrenders, in light of the provisions of the *Royal Proclamation of 1763*, are outlined in Table 1 (see p. 188).

It is apparent that the surrender of 1786 was not completed in accordance with *Royal Proclamation* protocol. The question is whether this omission renders the surrender invalid or whether it nonetheless reflects the intention of the parties to the extent that it should be upheld. To determine this issue, we must consider the intention of the parties.

Intention of the Parties

The Walpole Island First Nation argues that it is implicit in the representations made by the Crown in 1790 that lands which belonged to the aboriginal nations pursuant to the 1786 surrender were not ceded and would be protected from encroachment by settlers.[188] The First Nation further submits that, with the exception of Bois Blanc Island, the 1790 surrender reserved the

---

[185] Extract from the journal of Indian transactions at Detroit kept by Alexander McKee, Deputy Agent, May 18–22, 1790, NA, RG 10, vol. 45, pp. 23881–2 (ICC Documents, vol. 1, pp. 143–44).

[186] Extract from the Journal of Indian transactions at Detroit kept by Alexander McKee, Deputy Agent, May 18–22, 1790, NA, RG 10, vol. 45, p. 23881 (ICC Documents, vol. 1, p. 143).

[187] Surrender No. 2, May 19, 1790, in Canada, *Indian Treaties and Surrenders* (1891; reprint, Toronto: Coles Publishing Co., 1971), vol. 1, no. 2, 1 (ICC Documents, p. 141).

[188] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 41.

TABLE 1

The Surrenders of 1786 and 1790

Royal Proclamation and Crown Policy	1786 Surrender	1790 Surrender
Instructions, permission, or licence required	No evidence that McKee had instructions to obtain a surrender of the lands in question. McKee indicated to the Land Board at Hesse that he had no instructions from Sir John Johnson to purchase Indian lands in the area and that none had been purchased.	Clear direction from Lord Dorchester to McKee to obtain a "clear and complete cession" to the lands in question and to deal with the Indian title.
Governor, Commander in Chief, and/or Superintendent of Indian Affairs to be present	Three Crown witnesses not identified by position, but clearly not the Governor, Commander in Chief, or Superintendent General of Indian Affairs.	Major Murray, the Commanding Officer at Detroit, is named as being present and as having verified the items and goods provided as consideration.
Lands to be purchased or sold	No presents or money changed hands: McKee advised Land Board at Hesse that no lands were purchased.	Presents amounting to £1,200 exchanged, and verified by list attached to the document.
All Nations with an interest to be present at a public meeting in the presence of the Governor, Commander in Chief, or Superintendent of Indian Affairs	Only nine principal village Chiefs and war Chiefs of the Ottawa and Chippewa Nations involved; no evidence of public assembly; Governor, Commander in Chief, and Superintendent not present.	Thirty-five principal village and war Chiefs of the Ottawa, Chippewa, Huron, and Pottawatomi Nations involved; Council held for the purpose; not known if Governor, Commander in Chief, or Superintendent present.

"precise area of land for the use and benefit of the Indian Nations which had been surrendered to McKee in 1786."[189] According to the First Nation, the 1790 treaty therefore implicitly confirms the intentions of the parties that the lands covered by the 1786 surrender were intended to be held for the use, benefit, and protection of the aboriginal nations.[190] The First Nation argues that if the 1786 deed was intended for the Crown's benefit, and not for the benefit of the Indian Nations, settlement under the Crown's authority could have easily proceeded. It did not.[191]

---

[189] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 42.

The Walpole Island First Nation further submits that if the intent of the Crown was to keep the lands for itself, rather than for the future use and benefit of the Indian Nations, there was a fraudulent misrepresentation to the Indian signatories which would vitiate consent.[192] The First Nation argues that, when determining the legal effect of dealings between aboriginal peoples and the Crown, it is preferable to rely on the understanding and intention of the aboriginal nation, rather than a technical approach.[193] The First Nation refers to this approach as the "true purpose of dealings" or "true intentions" test, citing *St. Mary's Indian Band v. City of Cranbrook* and other cases in support.[194] Finally, the First Nation submits that the clear understanding and intention of the Indian signatories to the 1786 treaty were to convey the lands set out in that treaty to Alexander McKee, and for him to hold those lands in trust for the use and benefit of the Indian nations.[195]

By contrast, Canada argues that

> ... the First Nation asserts that oral terms surrounding the 1786 surrender confined the field of Canada's discretion in the manner in which the lands were to be dealt with. Canada submits that any alleged oral terms did not affect the unconditional nature of the surrender and in any event there is no evidence to support the existence of such oral terms in this case.[196]

If this argument is accepted, Canada argues, the document is clear and the intention of the parties is reflected within its terms – namely, an unconditional surrender of lands to the Crown.

We agree with Canada's submission that there is nothing on the face of the 1786 surrender to indicate that the lands were to be transferred for any conditional purpose. However, the fact that the surrender itself does not make reference to the statements attributed to McKee is not determinative of the matter. In *R. v. Sioui*, the Supreme Court of Canada held that "the courts should show flexibility in determining the legal nature of a document recording a transaction with the Indians. In particular, they must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration."[197]

---

[190] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 43.
[191] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 52.
[192] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 98.
[193] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 76.
[194] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 77.
[195] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 80.
[196] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 7.

In *R.* v. *Marshall*,[198] the Supreme Court of Canada held that

> ... extrinsic evidence is available to show that a written document does not include all of the terms of an agreement. ...
>
> Secondly, even in the context of a treaty document that purports to contain all of the terms, this Court has made clear in recent cases that extrinsic evidence of the historical and cultural context of a treaty may be received even absent any ambiguity on the face of the treaty. MacKinnon A.C.J.O. laid down the principle in *Taylor and Williams*, *supra*, at p. 236:
>
>> ... if there is evidence by conduct or otherwise as to how the parties understood the terms of the treaty, then such understanding and practice is of assistance in giving content to the term or terms.

The evidence as to Alexander McKee's intent in obtaining the 1786 surrender is unclear. According to Major Patrick Murray, who was present at the 1790 negotiations, the Indian signatories had surrendered the lands in trust to the Crown for use by the Huron and other Indians and for no other purpose:

> ... [T]he Intention and Express Purpose of the Indians by their Deed of cession to the Crown in 1784 [sic] *of this tract was in trust for Alex McKee Esq to whose regard for them, they were agreed to intrust their interests that this Deed being in trust to the Crown for the above purpose only*, it cannot be considered as transferring the Property to the Crown for any other purpose – and accordingly by the Governor in Council only leaves it to the Land Board to Report whether a Grant ought to be Given or not to Mr. McKee *but certainly never considered the Crown as willing to accept of or dispose of it for any other Purpose than that designed by the Grantors.*[199]

The report of the Land Committee indicated that "Mr. McKee states that the Hurons had ever considered that Tract to be essential to their comfort – their [the Indians'] sole intention in ceding it in 1786 was to have it put into

---

[197] *R. v. Sioui*, [1990] 1 SCR 1025, 3 CNLR 127 at 133–34 (cited to CNLR).

[198] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at 9.

[199] Major Murray, draught respecting the necessity of making a Reserve of Land at the Huron Church and River Canard for the Indians, NA, MG 19, F1, Claus Papers, vol. 4, p. 230 (ICC Exhibit 14, document 84).

Mr. McKee's hands to prevent encroachments by the Settlers in the Neighbourhood."[200]

McKee later confirmed that, when he solicited the lands, the 1786 surrender was made for the sole purpose of reserving lands in trust for use of the Huron. He explained in 1790:

> ... as there is an Indian Settlement on the River Canard that cannot be removed without creating confusion and perhaps trouble nor will it be consistent with good policy or humanity to force them to quit it. *It was my intention by Soliciting these lands (as Indians were already fixed there) to have accommodated several families Likewise which to my knowledge from their attachment to Government have been drove from their antient [sic] settlements and who in case of emergency might be depended upon as well as any other Inhabitants*, entertaining at the same time an Idea that all this description would be encouraged to live within the protection of the British Government ...[201]

On May 25, 1790, McKee wrote to Sir John Johnson describing the tract of land occupied by the Huron and again providing information as to the intent of "the Indians" in ceding it in 1786:

> ... That the intention and express purposes of the Deed of Cession to the Crown in 1784 [sic] of this Tract, *was in trust to me* to secure the Indians from encroachments, being convinced they would be disturbed in their possessions, which eventually must have produced troubles between them and the white Inhabitants, and to evince the truth of this, I have no Objections to relinquish any Interest or Claim, to the said Tract, for the public good ...[202]

In 1789, however, McKee had sought to have the 1786 grant formally ratified by the Governor. He sent the 1786 "deed" and a petition directly to the Governor, who returned it to the Board at Hesse advising it to "be very particular in your Minutes if you shall see cause in the exercise of Your discretion to give hopes to persons that indulge expectations under such Indian Grants as were not made agreeable to the Royal Instructions, nor have yet had the countenance or approbation of the government."[203]

---

[200] Report of the Land Committee at Quebec, December 24, 1791, NA, RG 1, L1, vol. 18, p. 318 (ICC Documents, p. 213).

[201] Alexander McKee to Lord Dorchester, May 5, 1790, PRO, CO 42, vol. 68, 215–16d, NA, RG 1, L4, vol. 2, p. 89 (ICC Exhibit 14, document 86). Emphasis added.

[202] Alexander McKee to Sir John Johnson, May 25, 1790, NA, RG 1, vol. 3, p. 308 (ICC Documents, 148).

[203] Henry Motz, Secretary to Lord Dorchester, to Land Board of Hesse, January 21, 1790, NA, RG 1, L4, vol. 2, p. 89 (ICC Documents, p. 106).

One source indicates that the reasoning behind McKee's request was "so that he might have it in his power to place such loyal subjects upon it as he may conceive worthy of such an indulgence."[204] McKee's application annoyed Patrick McNiff, the District Surveyor, who complained to the Board that he had applied for some of the same lands included within McKee's application:

> I have only to observe that should my petition appear to be the first that have gone through the regular Channel for that Land, I doubt not you will see the propriety of putting me in possession of a sufficient quantity of the front land, alluded to in my petition, to make me a small Farm, which is all I at present require. Had I known prior to my petitioning that Captain McKee had the most distant wish to have these lands, I had not asked for any part of them, I would even now give up my claim at that place in his favour, were it not for a certain Clause, which I perceive to be contained in the body of his petition for 6 miles square, in which space is comprehended the Land I have referred to. The Clause plainly expresses that he does not want that land for his own use but wishes to have it secured to him so that he may have it in his power to place such loyal subjects upon it as he may conceive worthy of such an Indulgence.[205]

McNiff further complained that if "loyalty" was to be the basis on which lands were granted, he should be ranked among the first favourites, "but in that case I should conceive to be receiving the land from his Majesty and not from Captain McKee ..."[206]

As noted by the Land Office of the Board of Hesse:

> ... before the 21st May 1790, the Crown had no lands in Hesse, except a square of seven miles at the River Canard upon the Straight ceded to His Majesty by the Ottawa and Chippawa Indians15th May 1786, by Deed: together with another Tract of seven miles ceded the 7th June 1784 by the Chippawas and Hurons at the mouth of the Streight which is claimed as being granted to and for the use of certain Officers & Soldiers who had served in the late War with the Indians, the Grantors of that tract ... *Alex McKee Esqr. claimed the Tract at the River Canard for his own use and that*

---

[204] Patrick McNiff to Land Board of Hesse, April 14, 1790, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 40, referred to in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), cv (ICC Exhibit 3).

[205] Patrick McNiff to Land Board of Hesse, April 14, 1790, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto, King's Printer, 1906), 40, referred to in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), cv (ICC Exhibit 3).

[206] Patrick McNiff to Land Board of Hesse, April 14, 1790, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 40, referred to in Ernest J. Lajeunesse, *The Windsor Border Region: Canada's Southernmost Frontier* (Toronto: Champlain Society, 1960), cv (ICC Exhibit 3).

> *of his friends, and had petitioned for a Grant of it under the Crown which petition was referred by His Excellency Lord Dorchester to the Board of Hesse the 21st January 1790 – it was withdrawn by Mr. McKee 14th May 1790 and has not been returned since.*[207]

As the minutes reflect, whether because of the complaints raised by McNiff, or for other reasons unknown to us, McKee was willing to withdraw his own application to the lands included in the 1786 surrender to enable the "Grantors" (the Ottawa and Chippewa) to do as they wished with the land.

Counsel for the Walpole Island First Nation submitted to the Commission, by letter dated May 18, 1999, that no apparent direction had been given to McKee in 1786 to secure a surrender of lands, including Boblo Island. Counsel argues that this lack of direction supports the claimant's position that the 1786 transaction was a private one between the Indian nations concerned and McKee for the purpose of protecting those lands from encroachment by white settlers. Counsel concludes:

> McKee's subsequent conduct in trying to get the lands on the mainland patented to himself is consistent with the arrangement which he had with the Indian Nations.[208]

It is not clear to us that McKee's attempt to have the lands in question transferred to him can be described as consistent with the arrangements he later claimed to have entered into with the Indian Nations to reserve the lands for the Huron. McKee's actions and words are, to say the least, inconsistent and conflicting, a point noted as far back as 1830 by a Land Committee reviewing the materials relating to the 1786 surrender. The Committee found that McKee's actions were "not very easy to be reconciled with the terms of the Deed or with his own subsequent application to Lord Dorchester and to the Land Board."[209]

The fact that McKee made application for the lands for his own use is troubling and tends to put in doubt his subsequent statement that the lands had been secured in trust to the Crown for the protection of the Huron. As a result, this trust may or may not have been *his* intention at the time; however, his statement, and that of Major Murray, reflect the aboriginal perspective on what they understood to have been achieved through their negotiations. The Ottawa and Chippewa Chiefs obviously wished to reserve lands for use of the Huron; the 1790 cession of lands in fact reserved some of the same lands purportedly surrendered in May 1786 for the use of the Huron and other Indians.

---

[207] Proceedings of the Land Committee at Quebec, December 24, 1791, NA, RG 1, L1, vol. 18, pp. 345–46 (ICC Documents, pp. 200–1), referring to a letter from the Land Board of Hesse to the Land Committee at Quebec, May 6, 1791. Emphasis added.

[208] Russell M. Raikes, Cohen Highley Vogel & Dawson, to Daniel J. Bellegarde, ICC, May 18, 1999, ICC file 2105-9-3, vol. 3.

[209] Report of the Legislative Council to the Lieutenant Governor of Upper Canada, March 12, 1930, NA, RG 1, E1, p. 327 (ICC Documents, p. 304).

In the case of a surrender, while we must take into account the perspectives of each party, we must be especially mindful of the intentions of the aboriginal parties, in light of the consequences flowing from a surrender. If the aboriginal parties to a document do not intend it to operate as a surrender, but, rather, that it "reserve" lands, we do not believe it can be construed as a surrender simply because its written terms depict it as such. The surrender in this instance was written in English. We have no evidence that it was interpreted to its aboriginal signatories. The only evidence we have is to the effect that the intention of the signatories was to reserve, not surrender, lands. Even in contracts, which are subject to much stricter interpretive rules than treaties,[210] the doctrine of ***non est factum*** applies to prevent those who are not capable of understanding a deed or other document from being divested of their property.[211]

We find, then, that the intention of the aboriginal parties to the 1786 surrender was not to cede the land for use by third parties, but to ensure that the Huron were protected by the Crown from encroachments by others. This intention applied not only to the mainland tract but to Bois Blanc Island. We are supported in this conclusion by comments made by McKee's own son in 1802. Thomas McKee wrote to Lieutenant Colonel Smith on May 3, 1802, to the effect that Boblo Island was Indian property and was never ceded to the Crown, adding: "I think it my duty to ... inform you that when they made the last Session of their Lands to the Crown they stated in their speech that this Island is expressly reserved for the encampment of their Indian Brethren, which was transmitted to the Head of the Indian Department."[212]

We therefore conclude that the 1786 surrender should not be found to be a cession of lands, as it does not reflect the intention of the aboriginal parties. As well, it is invalid, as it did not comply with the provisions of the ***Royal Proclamation***, an imperial policy clearly put in place to establish a protocol that would avoid frauds and abuses and put a stop to the surrender of Indian lands for "trifling considerations."[213] Alexander McKee took the surrender without instructions to do so, for purposes that remain unclear. As a result, we do not find that it can be interpreted as a valid surrender. We find that the surrender did not have the effect of alienating lands to the Crown, in light of the intention of the aboriginal parties who signed it that it reserve lands, rather than cede them to the Crown unconditionally for the use of third parties, as was argued by Canada.

---

[210] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at paragraph 10: "Rules of interpretation in contract law are in general more strict than those applicable to treaties ..."

[211] See, for example, *Gallie v. Lee and Another*, [1971] AC 1004 (House of Lords).

[212] Captain Thomas McKee, Petite Cote, to Lieutenant Colonel V. Smith, Amherstburg, May 3, 1802, in *Michigan Pioneer and Historical Collections* 23 (1895):11–12 (ICC Exhibit 14, document 89).

Extinguishment

Canada argues that even if the surrender is invalid, the mere taking of the surrender itself evidences the clear and plain intention of the Sovereign to extinguish aboriginal rights and title within the area of Boblo Island, and points to the actions of the Sovereign in later years in support. Canada submits that "[t]he Royal Proclamation was intended to interpose the Crown between Indian Nations and third parties. It was not intended to affect the Crown's Royal Prerogative to extinguish aboriginal rights or title to land."[214] As stated in Canada's submissions:

> It is the Crown's submission that the Royal Proclamation was a policy, the purpose of which was to regulate "purchases" of Indian lands *by third parties*. The Royal Proclamation did not affect the inherent right of the Crown to extinguish aboriginal rights.[215]

It is Canada's position, then, that the fact that the 1786 surrender was entered into by the Crown means the surrender had the effect of extinguishing any Indian title to Boblo Island.[216] Canada argues that this is so whether the Walpole Island First Nation was a signatory to the surrender or not.[217] Canada argues in support of its position that aboriginal rights prior to 1982 could be extinguished by unilateral action of the Crown and that the surrender is evidence of the Crown's clear and plain intention to extinguish any and all aboriginal rights in the surrendered area.[218] Canada argues that the 1786 surrender therefore has the effect of extinguishing all aboriginal rights in the area covered by it.[219]

---

[213] Report to Council, July 9, 1754, E.B. O'Callaghan, ed., *Documents Relative to the Colonial History of the State of New-York* ..., 15 vols. (Albany, NY: Weed, Parsons & Co., 1856–87), 6: 888 (ICC Documents, p. 8).

[214] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 43.

[215] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 36. Emphasis in original.

[216] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 4.

[217] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 43.

[218] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 44–45.

Unlike some other treaties, such as the peace and friendship treaties[220] that do not involve land, a surrender of land by treaty divests the First Nation affected of its title and extinguishes its rights. The proof of extinguishment of an aboriginal right, including aboriginal title, lies on the Crown, and the intention to extinguish aboriginal rights must be "clear and plain."[221] To the extent to which the Crown relies on the 1786 surrender as evidence of extinguishment,[222] it bears the very high onus of proving extinguishment.

In order to establish extinguishment, it is incumbent on the Crown to prove that the Sovereign had the clear intention in taking the 1786 surrender to extinguish aboriginal title to lands. Moreover, a surrender is not a unilateral act, but an agreement between two or more parties. It must therefore be the intention of both signatories to the agreement that lands be surrendered.

Canada argues in reliance on *A.G. for Ontario v. Bear Island Foundation et al*[223] that a surrender can extinguish the interests of First Nations that are not parties to it.[224] The Walpole Island First Nation, in contrast, argues that the 1786 surrender is not binding on it, in that its ancestors were not signatories to the surrender.[225] The First Nation argues that the evidence, post 1786, shows that the First Nation continued to use the island as it had previously until prevented from doing so by Crown actions.[226] As a result, the First Nation argues that there is no adhesion to the treaty as there was in *Bear Island*,[227] in that there is no compelling evidence that the ancestors of the Walpole Island First Nation authorized the signatories to sign on their behalf or subsequently ratified the treaty through separate deed or conduct.[228]

In *Bear Island*, the Ontario Court of Appeal held that the "sovereign may express the intent to extinguish aboriginal rights through a treaty even though the treaty itself may be imperfect in the sense that not all of the Indian bands or tribes whose lands are involved are signatories."[229] In the facts before the Court, the Governor General in Council of the province of Canada had ratified the 1850 Robinson Huron Treaty and directed it to be registered in the office of the Registrar General.[230] The Sovereign's intent to take the lands, acting through the Governor in Council, according to the Court of Appeal, was therefore clear.[231]

---

[219] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 5.

[220] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at 10–12. See also *R. v. Sioui* , [1990] 1 SCR 1025, 3 CNLR 127.

[221] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1098–99. See also *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at 1043.

[222] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 3.

[223] *A.G. for Ontario v. Bear Island Foundation et al*, [1985] 1 CNLR 1.

[224] Submission on Behalf of the Government of Canada, March 22, 1999, paragraphs 46–54.

[225] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 83.

[226] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 84.

[227] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 84.

[228] Submission on Behalf of the Walpole Island First Nation, March 12, 1999, paragraph 85.

[229] *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73 at 87.

On the facts we have, there is sufficient uncertainty as to the purpose of McKee's intentions in obtaining the 1786 surrender, with the result that we are unable to find extinguishment proven with the requisite degree of proof. McKee may have intended to take the lands, as is alleged by Canada, for use by third parties or, indeed, for his own use. Alternatively, he may have intended to reserve the lands for use by the Huron. The evidence is equivocal in this regard. However, the factual underpinnings to *Bear Island* do not apply here. In *Bear Island*, those First Nations that signed the treaty/surrender intended to surrender lands; the issue arose as to those who had not signed the treaty, but who were found to have adhered to its provisions later. Regardless of the Crown's intent in this claim, the aboriginal signatories to the 1786 surrender, according to McKee himself, did not intend to surrender the lands in question. We do not see how the Crown can rely on this document to prove the extinguishment of the interest of strangers to it, when, if valid as a treaty, it would not have extinguished the interest of those First Nations that signed it, according to the principles of treaty interpretation.

The decision in *Bear Island* is also distinguishable on its facts. In this instance, Walpole Island, the taking of the surrender was not ratified by the Governor in Council, as it was in *Bear Island*. Instead, the Crown felt the need to deal with the aboriginal title to the tract purportedly surrendered in 1786 by obtaining a second "cession" of essentially the same lands (at least those on the mainland) in 1790. Despite the fact that Bois Blanc Island was not dealt with in 1790, we cannot draw a distinction between the island and the mainland tract. Whatever misgivings the Crown had about the surrender applied to both locations. Obviously the Crown itself had doubts about the validity of the surrender obtained in 1786, or it would not have obtained a second one. The fact that the second surrender reserved the lands purportedly surrendered in 1786 (with the exception of the island, which was not mentioned) again militates against a finding of "clear and plain" intent to extinguish the aboriginal interest in the lands at question in 1786.

---

[230] *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73 at 86.

[231] *Ontario (A.G.) v. Bear Island Foundation*, [1989] 2 CNLR 73 at 86.

Canada argues, however, that the fact that the Crown subsequently acted as if it obtained title to the island is sufficient to prove clear and plain intent. Canada points to the construction of two blockhouses at each end of the island in 1796; a petition from James Hackett for land for a lighthouse; the transfer of lands to the province in 1856; and the registration of Crown patents to the lands in 1868 and 1874 as *indicia* in support of this intent.[232]

While, in certain circumstances, the subsequent actions of a party can shed light on its intentions at an earlier time, we do not find that the subsequent actions of the Crown lead to any firm conclusions about the Crown's intention at the time of the purported surrender. That the Crown later believed it had title to the island and behaved as if it did does not evidence the clear and plain intention to extinguish title in 1786, but is equally consistent with a mistaken belief later on that a valid surrender had been obtained in 1786. As was noted by the Supreme Court of Canada, and not overturned, the British Columbia Court of Appeal in *Delgamuukw* held that

> [i]ntention to extinguish must be clear and plain. Although express language is not strictly necessary, the honour of the Crown requires its intentions to be either express or manifested by unavoidable implication. Unavoidable implication should not be easily found – it occurs only where the interpretation of the instrument permits no other result. This, in turn, depends on the nature of the aboriginal interest and of the impugned grant.[233]

Similarly, Lambert JA of the British Columbia Court of Appeal (dissenting on other grounds) found that,

> [i]n considering implicit extinguishment ... it will only be held to occur where no other conclusion is possible from the particular instrument or conduct. It could not take place through adverse dominion. In the case of an inconsistency between a Crown grant of land and aboriginal title, the title should not necessarily give way in the absence of a clear and plain intention to extinguish. In any case, no grants or other interests were granted in the territory prior to 1871, and after that date, the British Columbia legislature had no power to legislate to extinguish, by adverse dominion, or otherwise.[234]

---

[232] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 50.

[233] *Delgamuukw v. British Columbia*, [1997] SCR 1010 at 1043. See *Delgamuukw v. British Columbia*, [1993] 5 CNLR at 51–55.

[234] *Delgamuukw v. British Columbia*, [1997] SCR 1010 at 1043. See *Delgamuukw* v. *British Columbia*, [1993] 5 CNLR at 182–205.

We do not find that the Crown has established a clear and plain intention on the part of the Sovereign to extinguish the aboriginal interest in lands in 1786. The interpretation of the document provides an alternative conclusion equally consistent with the evidence – namely, the intention at the time that the aboriginal interest be protected and reserved for the use of the Huron. As noted above, adverse dominion is insufficient to supply evidence of implied extinguishment.

ISSUE 2 (a) WERE THE CHIEFS AND PRINCIPAL MEN OF THE WALPOLE ISLAND FIRST NATION SIGNATORIES TO THE ALLEGED SURRENDER OF MAY 15, 1786?

In light of our findings, it is not necessary to discuss the remaining issues, except where they may affect the ultimate disposition of this claim.

In terms of the second issue, Canada argues that the historical record and the joint research conducted by James Morrison are inconclusive as to the relationship between the signatories to the 1786 surrender and the current claimant.[235] According to the information available, none of the signatories to the 1786 Treaty can be specifically linked to the Walpole Island First Nation.[236] The four Chippewa signatories to this surrender "belonged to the Thames River and possibly the Pelee Island/Anderdon regional bands."[237] However, Morrison indicated that while it is relatively simple to identify the nation of each of the Chiefs, it is difficult to identify particular groups or subdivisions of the nations involved at the time.[238]

We address this issue simply because it raises questions as to which party bears the onus of proof. Canada argues that the onus is on the claimant to prove that there is no connection between the signatories to the treaty and the Walpole Island First Nation.[239]

We agree that, in most instances, the onus of proof rests with the claimant. However, where it is the Crown that relies on a surrender as evidencing extinguishment of title, the onus of proving extinguishment rests with the Crown.[240] It is therefore incumbent on the Crown to prove that the surrender was valid and that the Walpole Island First Nation was a party to it, or that section 35 rights have otherwise been extinguished. It is not incumbent on the First Nation, as the Crown described it, to "prove a negative."

---

[235] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 5.

[236] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, pp. 3–4 (ICC Exhibit 13).

[237] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, pp. 3–4 (ICC Exhibit 13).

[238] James Morrison, "Identity of Signatories to Treaties No. 116 (1786) and No. 2 (1790)," October 1997, pp. 3–4 (ICC Exhibit 13).

[239] Submission on Behalf of the Government of Canada, March 22, 1999, paragraph 42.

[240] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1098–99.

We find on the balance of probabilities that the ancestors of the Walpole Island First Nation were in all likelihood not signatories to the surrender. Although the evidence is not conclusive, it is sufficient. As stated in ***R. v. Simon***, the burden of proof must not be so high as to be incapable of proof.[241] Furthermore, as noted in ***R. v. Marshall***:

> The law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible. The reality, of course, is that the courts are handed disputes that require for their resolution the finding of certain historical facts. The litigating parties cannot await the possibility of a stable academic consensus. The judicial process must do as best it can.[242]

ISSUE 2 (b) IF THEY WERE NOT, DOES THIS MAKE THE SURRENDER INVALID WITH RESPECT TO THE WALPOLE ISLAND FIRST NATION?

Since we have concluded that the 1786 surrender is invalid, the question of adhesion does not apply. The surrender, in our view, is not valid with respect to anyone, including the Walpole Island First Nation. As a result, the 1786 surrender does not extinguish whatever aboriginal rights or title may have existed to Boblo Island in 1786, since the island was not included in the 1790 cession of lands. We cannot therefore make any determination of this issue other than to recommend that the Walpole Island First Nation resubmit its claim through the Comprehensive Claims Policy.

ISSUE 3 WAS THERE CONSIDERATION FOR THE TRANSFER?

We have discussed this question under Issue 1.

ISSUE 4 IF THERE WAS NOT, DOES THIS RENDER THE SURRENDER INVALID?

We have discussed this question under Issue 1.

---

[241] *R. v. Simon*, [1985] 2 SCR 387 at 407–8.

[242] *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at 16, paragraph 37.

ISSUE 5 (a) DID THE CROWN AND/OR INDIANS REGARD THE SURRENDER OF 1786 AS INVALID WHEN THEY ENTERED INTO THE SURRENDER OF 1790?

We have no information as to what the Indians thought of the surrender of 1786 when they entered into the surrender of 1790.

We have no conclusive information as to the view taken of the 1786 surrender by the Crown at the time. Certain members of the Land Board of Hesse apparently considered the surrender to be a valid cession; others, including Major Patrick Murray, who was the Chair of the Board, disagreed.[243] We know, however, that the Crown considered the grant to the Indian officers in 1784 to be invalid. As noted from the minutes of the Land Committee, Sir John Johnson had written in January 1791 that the Board stopped giving permission to Loyalists to settle, as had been done by Major Robert Matthews previously, because of its concern that the lands had not legally vested in the Crown:

> From the best information I was able to collect, when in the District of Hesse, of the Causes of the difficulties and impediments that had obstructed Settlement on the East side of the Streight of Detroit, I found the following to be the principle vizt The not continuing to give permission to Loyalists and Emigrants from the States to take up Lands in the manner that had been authorized and practiced by Major Mathews and Major Close on the Land, ceded to the Indian Officers &c by the Indians previous to the establishment of the Land Boards, Surveys of which had been made under the direction of one or both of those Gentlemen, but were not considered as valid by the Land Board, as they did not conceive the Land legally vested in the Crown, nor the Surveyor properly qualified to act, consequently no certificates for Land could be granted till the late [1790] purchase.[244]

It appears on all the information before us that there was sufficient uncertainty about the validity of the 1786 surrender for McKee to be instructed three years later to obtain a cession of the Indian title to lands that included the area purportedly surrendered in 1786. As discussed in Part II, on August 17, 1789, Governor Dorchester instructed Superintendent Johnson to direct McKee to take a treaty with the Indians in the District of Hesse, "who may lay claims to pretensions to a tract of land; beginning at the Western boundary of the last purchase made by the Crown from the Indians West of Niagara, and extending along the whole, or such part of the borders of Lake Erie, and the Streight of Detroit, up to such distance towards Lake Huron, and to such depth from the shore as the Land board for the District of Hesse shall see expedient to be set apart for the settlement."[245]

---

[243] Minutes of the Land Board of Hesse, May 28, 1790, in *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 11–12, and handwritten notes of Major Murray's dissension (ICC Exhibit 12, pp. 84–5).

[244] [Sir] John Johnson, Montreal to [Land Committee], January 27, 1791, quoted in Proceedings of the Land Committee at Quebec, February 4, 1791, NA, RG 1, L1, vol. 18, pp. 339–41 (ICC Documents, pp. 173, 194–96).

ISSUE 5 (b) IF SO, WHAT IS THE EFFECT OF THE 1790 SURRENDER ON THE ALLEGED SURRENDER OF 1786?

It is common ground between the parties that the 1790 surrender was valid and that it did not include the surrender of any islands. The only area referred to in 1786 which was not covered by the 1790 surrender was Bois Blanc Island. The parties entered into a second surrender that effectively nullified the written text of the first by expressly reserving in 1790 most of the lands that had been "surrendered" in 1786. We find that the 1786 surrender was effectively revoked in 1790 because the 1790 surrender is necessarily inconsistent with its terms.

ISSUE 6 IS THE CROWN ESTOPPED FROM RELYING UPON THE SURRENDER OF 1786?

Although we may be suspicious of Alexander McKee's intent in securing the 1786 surrender, we would nonetheless have found that the Crown was bound by the representations made in 1790 by McKee to his superiors as to the intention of the aboriginal parties to reserve, rather than surrender, lands in a transaction that took place only four years earlier. Since we have found the surrender of 1786 to be invalid, it cannot be relied on by the Crown to prove the extinguishment of aboriginal title to Boblo Island.

In this regard, it must first be remembered that the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions that have an impact on treaty or aboriginal rights must be approached in a manner that maintains the integrity of the Crown. Second, it is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned.[246] In *Sparrow*, the

---

[245] Lord Dorchester to Sir John Johnson, August 17, 1789, *Third Report of the Bureau of Archives for the Province of Ontario for 1905* (Toronto: King's Printer, 1906), 32–33 (ICC Exhibit 14, document 110).

[246] See *R. v. Sparrow*, [1990] 1 SCR 1075 at 1107–8, 1114. See also *R. v. Taylor* (1981), 34 OR (2d) 360 at 367 (Ont. CA).

Supreme Court cited with approval the Ontario Court of Appeal decision in *R. v. Taylor and Williams*:

> The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty, quite apart from the other considerations already noted, the honour of the Crown is always involved, and no appearance of "sharp dealing" should be sanctioned.[247]"

This principle has most recently been repeated by the Supreme Court of Canada in *R. v. Badger*, in which the Court held: "The honour of the Crown is always at stake in its dealings with Indian people ... It is always assumed that the Crown intends to fulfill its promises. No appearance of 'sharp dealing' will be sanctioned."[248]

In *R. v. Marshall*, the Supreme Court of Canada held it would be unconscionable to permit the Crown to ignore the oral terms of the agreement reached in 1786:

> ... where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms, per Dickson, J. (as he then was) in *Guerin* v. *The Queen* [1984] 2 S.C.R. 335. Dickson, J stated for the majority at p. 388:
>
>> Nonetheless the Crown in my view was not empowered by the surrender document to ignore the oral terms which the Band understood would be embodied in the lease. The oral representations formed the backdrop against which the Crown's conduct in discharging its fiduciary obligation must be measured. They inform and confine the field of discretion in which the Crown was free to act. After the Crown's agents had induced the Band to surrender its land on the understanding that the land would be leased on certain terms, it would be unconscionable to permit the Crown to simply ignore those terms.[249]

We note our concern that Canada has attempted to rely on the surrender as a valid treaty and, at the same time, to rely on the surrender as evidence of extinguishment in circumstances where the evidence is at least equivocal and where the Crown's own representative, Alexander McKee, indicated it was the intention of the aboriginal signatories that the lands were to be protected for aboriginal uses, not surrendered for general purposes. A reliance by the Crown on a surrender of Bois Blanc Island in the circumstances outlined

---

247 *R. v. Taylor*, [1981] 3 CNLR 114 at 123.
248 *R. v. Badger*, [1996] 1 SCR 771 at 794.
249 *R. v. Marshall*, [1999] SCJ no. 55, file 26014 at 9.

would, in our view, amount to "sharp dealing." Were it necessary do so, we would find Canada estopped from relying on the surrender of 1786 as evidencing the extinguishment of aboriginal title to Boblo Island.

ISSUE 7 DID THE CROWN BREACH ITS FIDUCIARY OBLIGATIONS IN OBTAINING THE SURRENDER?

In light of our overall findings, it is not necessary to answer this question.

PART V

CONCLUSIONS AND RECOMMENDATION

We were asked to inquire into Canada's rejection of the Walpole Island First Nation's claim to Boblo Island. The primary issue to resolve was whether a surrender of May 15, 1786, entered into by Chiefs of the Ottawa and Chippewa Nations and negotiated by Alexander McKee contravened the provisions of the *Royal Proclamation of 1763*. Other issues, such as whether there was consideration for the surrender, were subsumed under this larger issue. These secondary issues included whether the Walpole Island First Nation was a signatory to the May 15, 1786, surrender; what the effect was of a later, 1790, surrender on the alleged surrender of 1786; whether the Crown was estopped from relying on the surrender of 1786; and whether the Crown had breached its fiduciary obligations in obtaining the surrender.

After carefully reviewing the evidence before us, we concluded that the surrender of May 15, 1786, was invalid on the basis not only that it did not comply with the provisions of the *Royal Proclamation of 1763*, but that contextual information indicates that the signatories to the surrender understood it would reserve lands, not surrender them. In reviewing the intention of the parties, we concluded that McKee's later comments to the effect that the lands were to be reserved for the Huron in 1786 were inconsistent with the terms of the surrender itself. In light of these comments, we concluded that the Crown would be estopped from relying on the terms of the 1786 surrender as extinguishing the aboriginal interest in Boblo Island.

We also determined that a 1790 surrender, which reserved most of the same lands as those purportedly surrendered in 1786, is necessarily inconsistent with the provisions of the 1786 surrender and therefore revoked it. As a result, the 1786 surrender is of no force or effect.

Given that Bois Blanc Island has not been the subject of any other surrenders and was not surrendered in 1790, whatever aboriginal title may have existed to Bois Blanc Island in 1786 continues to exist today.

We therefore recommend to the parties:

That the Walpole Island First Nation resubmit its claim to the federal government under the Comprehensive Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

Daniel Bellegarde

Roger Augustine

Daniel J. Bellegarde
Commission Co-Chair

Roger J. Augustine
Commissioner

Dated this 1st day of May, 2000.

APPENDIX A

WALPOLE ISLAND FIRST NATION BOBLO ISLAND INQUIRY

1 **Planning conference** July 12, 1996

2 **Pre-hearing conference** January 28, 1999

3 **Legal argument** April 7, 1999

4 **Content of formal record**

The formal record for Walpole Island First Nation Boblo Island Inquiry consists of the following materials:

- the documentary record (3 volumes of documents)
- 14 exhibits tendered during the inquiry
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and for Walpole Island First Nation, including authorities.

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

INDIAN CLAIMS COMMISSION

CARRY THE KETTLE FIRST NATION INQUIRY
CYPRESS HILLS CLAIM

PANEL

Commission Co-Chair P.E. James Prentice, QC
Commissioner Roger J. Augustine
Commissioner Carole T. Corcoran

COUNSEL

For the Carry the Kettle First Nation
Thomas J. Waller

For the Government of Canada
Aly N. Alibhai

To the Indian Claims Commission
David E. Osborn, QC / Kathleen N. Lickers

JULY 2000

CONTENTS

EXECUTIVE SUMMARY 213

PART I ***INTRODUCTION*** 216
Background to the Inquiry 216
Mandate of the Indian Claims Commission 217

PART II ***HISTORICAL BACKGROUND*** 220
Carry the Kettle First Nation 220
  Assiniboine Use and Occupation of the Cypress Hills 221
  Ancestral Connection to the Cypress Hills 224
  Cypress Hills Massacre 227
Establishing Order in the Cypress Hills, Fort Walsh, 1875 to 1883 229
Treaty 4, 1874 231
  Assiniboine Adhesion to Treaty 4, 1877 236
Appointment of Edgar Dewdney as Indian Commissioner, 1879 240
Selecting the Assiniboine Reserve Site, Cypress Hills, 1879 242
  Assiniboine Reserve, Little Child's Reserve, and Farming Agencies, 1879–80 244
  Survey of the Reserve, 1880 250
Dewdney's Relocation Proposal, November 1880 256
Indian Influx to Fort Walsh, Spring and Summer 1881 260
  Maple Creek, Little Child, and the Assiniboine Band, 1881 262
  First Attempt to Settle the Assiniboine Band at Maple Creek, June 1881 265
  Directions from Ottawa, July 1881 268
Closing Fort Walsh, August 1881 269
  Fort Walsh, Winter 1881–82 271
  Second Attempt to Settle Band at Maple Creek, February 1882 275
Move to Qu'Appelle, Spring 1882 278
The "New Reserve," Indian Head, Summer 1882 282
  Fort Walsh, Fall 1882 286
  Fort Walsh, Winter 1882–83 289
  Return to Indian Head, Spring 1883 290
  Government "Success," Fall 1883 292

Famine, Indian Head, Spring 1884 294
Band Amalgamation and Reserve Survey, 1885 294
Existence of Cypress Hills Reserve Denied, 1909 296

PART III ***ISSUES*** 298

PART IV ***ANALYSIS*** 299
Issue 1: Creation of Cypress Hills Reserve 299
  Issue 1(a): Was a Reserve Created Pursuant to the Terms of Treaty 4? 299
    Principles of Treaty Interpretation 300
    Consultation and Selection 304
    The Survey 305
      Dewdney's Authority 306
      Completed Survey 307
    Acceptance of the Survey 309
  Issue 1(b): Was a Reserve Created Pursuant to the *Indian Act?* 314
  Issue 1(c): Was a *De Facto* Reserve Created? 319
Issues 2 and 3 321
Fairness in the Result: Our Supplementary Mandate 321

PART V ***CONCLUSIONS AND RECOMMENDATIONS*** 325

APPENDIX 326
A Carry the Kettle First Nation Cypress Hills Inquiry 326

EXECUTIVE SUMMARY

The Commission has been asked to examine and report on whether the Government of Canada set apart a reserve at the Cypress Hills in southwestern Saskatchewan for the people of the Assiniboine Chiefs Man Who Took the Coat and Long Lodge. The members of the Carry the Kettle First Nation in Saskatchewan are descended from the followers of these two Assiniboine chiefs, who adhered to Treaty 4 at Fort Walsh, in the Cypress Hills, in 1877.

The Cypress Hills are 2,500 square kilometres of flat-topped uplands in southwestern Saskatchewan and southeastern Alberta. Surrounded by relatively barren flat land, they are the highest point in mainland Canada between Labrador and the Rocky Mountains. Various nations, including the Assiniboine, used the Cypress Hills for hunting and gathering in the summer and shelter in the winter, but the Assiniboine have continued to maintain a deep, spiritual connection to the Cypress Hills.

The Commission twice visited the people of the Carry the Kettle First Nation during the course of this inquiry, and on each visit the reverence of these people for their traditional territory was evident. In the days before adhering to Treaty 4, the Assiniboine occupied the Cypress Hills as part of their "homeland" and it was during this period that the Cypress Hills Massacre took place. The massacre was one of the most tragic events in Canadian history. History records how in 1873 Assiniboine men, women, and children were slaughtered in their camp by drunken wolf hunters from Montana in a dispute over stolen horses. To this day, the Carry the Kettle First Nation visits the burial site of their slain members each June 1.

It therefore came as no surprise that the Assiniboine people would seek to preserve their connection to the Cypress Hills when a reserve was selected and apportioned under Treaty 4. It is the creation of this reserve that is at issue in this inquiry. The Carry the Kettle First Nation submitted that, after they verbally selected the site for their reserve in the Cypress Hills during the summer of 1879, Indian Commissioner Edgar Dewdney dispatched Dominion Land Surveyor Allan Poyntz Patrick to survey the land the Assiniboine selected.

Unable to complete his survey until the summer of 1880 because of inclement weather, A.P. Patrick's completed plan of survey did not in fact arrive in Ottawa until July 1881. In the interim, the Indian Department had decided to relocate the Assiniboine from the Cypress Hills. This inquiry is therefore devoted to examining the elements of reserve creation pursuant to the terms of Treaty 4, pursuant to the provisions of the *Indian Act*, and finally on a *de facto* basis.

After a thorough and careful examination of all the evidence, the Commission is unable to conclude that a reserve had been created for the Assiniboine Band on any basis. It is our view that the requisite elements to the setting aside of reserves under Treaty 4 included consultation and selection, followed by survey, followed by ultimate acceptance by both the First Nation *and* Canada. The acceptance of the survey could be effected in a formal manner or could be found in the conduct of either party.

The evidence is incontrovertible that Canada dispatched A.P. Patrick to survey a reserve and that the Assiniboine did select land in the Cypress Hills. In our view, the evidence is also clear that the First Nation accepted the land surveyed as its reserve. The absence of evidence of Canada's formal acceptance of Patrick's survey means that we must look to the conduct of the party. In this case, Canada's conduct following the dispatch of surveyor A.P. Patrick leads us to conclude that Canada would not have accepted Patrick's survey when it reached Commissioner Dewdney's office in July 1881 because Canada had decided to relocate the Assiniboine from the Cypress Hills well before July 1881. We therefore conclude that Canada did not accept Patrick's survey of the area selected as a reserve pursuant to Treaty 4.

Examining the provisions of the *Indian Act* reveals that the statute is silent as to the process for creating a reserve. The absence of specific provisions in the *Indian Act* to set apart reserves, however, does not lead us to accept Canada's contention that the setting aside of reserve land is simply a matter of royal prerogative. The absence of a statutory reserve creation process, we believe, directs us to the provisions of the treaty. In our view, the treaties contemplated the involvement of both parties: a true meeting of the minds was fundamental to the selection, surveying, and setting aside of reserves. For the reasons previously explained, we are unable to conclude that the Government of Canada was a party to such consensus.

Finally, the question of whether a reserve had been created on a *de facto* basis – namely, whether Canada by its conduct set aside a reserve – involves a consideration of the same facts. In our view, the totality of the evidence does not demonstrate that the land set aside in the Cypress Hills was a reserve.

Having found that the totality of evidence does not support a finding that a reserve was created for the Assiniboine in the Cypress Hills pursuant to the terms of Treaty 4, the provisions of the *Indian Act*, or on a *de facto* basis, we reluctantly conclude that Canada does not owe an outstanding lawful obligation to the First Nation.

We say reluctantly because the ancestral claim of the Carry the Kettle Band to the Cypress Hills is incontrovertible. It is clear to us that, when reserves were selected and apportioned under Treaty 4, the Assiniboine people sought to preserve their connection to the Cypress Hills. Although many other First Nations sought sanctuary in the Cypress Hills, the Carry the Kettle Band repeatedly fought the government's attempts to relocate it to other lands. Eventually, the Carry the Kettle Band did succumb to this pressure, but it did so reluctantly and only when faced with starvation as an alternative.

In this inquiry we rely upon our supplementary mandate to draw to government's attention the circumstances of this case because we consider the outcome unfair, even though these circumstances do not give rise to an outstanding obligation. In the final analysis, we are unable to find that a reserve has been created for the Assiniboine. However, this conclusion does not do justice to the First Nation for it ignores the historical connection that has existed between the Carry the Kettle people and the Cypress Hills since time immemorial, a connection that was so tragically severed. In this report, we examine the history of the Carry the Kettle First Nation in the Cypress Hills and their forced removal at the hands of the government of the day.

PART I

INTRODUCTION

BACKGROUND TO THE INQUIRY

In 1992, the Carry the Kettle First Nation submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) alleging that a reserve surveyed for the Assiniboine in the Cypress Hills had been wrongfully taken because the surrender provisions of the *Indian Act* were not complied with.

Based on a preliminary analysis of the submission, Canada rejected the claim in a letter dated December 8, 1993. Jane-Anne Manson, Specific Claims Branch, stated in the letter that "a reserve was not created in 1880, either legally or de facto, and consequently the specific claim is not recommended for negotiation."[1] On August 30, 1996, the First Nation requested that the Indian Claims Commission (ICC) conduct an inquiry into the rejection of this claim.

During the course of the inquiry, Canada provided additional particulars as to the basis for its rejection of the claim. Canada explained:

> If the Carry the Kettle First Nation is not estopped from bringing this claim, it is Canada's position that a reserve was never created in the Cypress Hills. Although a reserve in the Cypress Hills was surveyed in 1880, it is Canada's view that this is insufficient for a reserve to be created. It is our position that the Royal Prerogative to set aside reserve lands was never exercised in relation to a reserve in the Cypress Hills. Furthermore, the evidence does not support a finding that a reserve in the Cypress Hills was ever set aside on a *de facto* basis.[2]

---

[1] Jane-Anne Manson, Assistant Negotiator, DIAND, to Stephen Pillipow, Counsel for Carry the Kettle First Nation, December 8, 1993 (ICC file 2107-19-3).

[2] Rosemary Irwin, Counsel, Specific Claims Branch, DIAND, to Kathleen Lickers, Legal Counsel, Indian Claims Commission, March 4, 1997 (ICC file 2107-19-3).

Although the issue of estoppel was raised by Canada during the inquiry's preliminary stages, Canada later advised that it would not be relying on estoppel.

MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on "whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister."[3] This Policy, outlined in the 1982 booklet entitled ***Outstanding Business: A Native Claims Policy – Specific Claims***, states that Canada will accept claims for negotiation where they disclose an outstanding "lawful obligation" on the part of the federal government.[4] The term "lawful obligation" is defined in ***Outstanding Business*** as follows:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation", i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
>
> ii) A breach of obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
>
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
>
> iv) An illegal disposition of Indian land.

Furthermore, Canada is prepared to consider claims based on the following circumstances:

> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.

---

[3] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[4] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.

It should also be explained that, when the original mandate of the Commission was still under discussion, Tom Siddon, then Minister of Indian Affairs and Northern Development, wrote to then National Chief Ovide Mercredi of the Assembly of First Nations setting out the basis for what the Commission has previously referred to as its "supplementary mandate":

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[5]

In an October 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the Commission's jurisdiction:

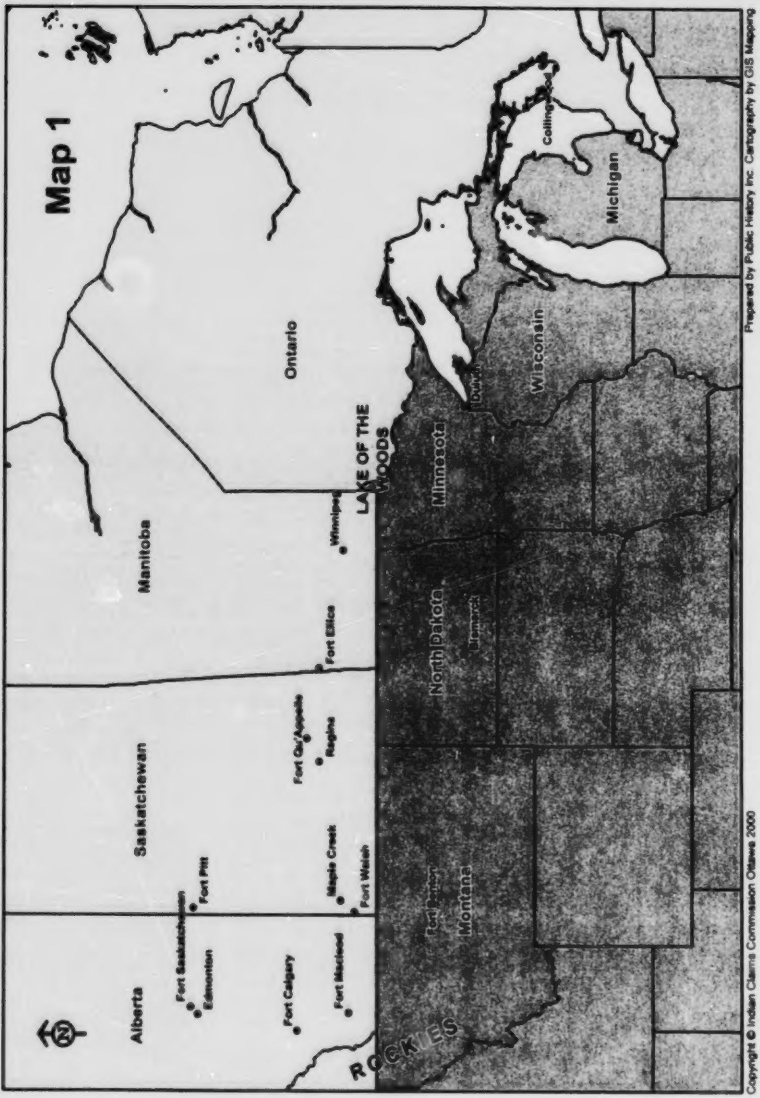
> (1) I expect to accept the Commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the Commission's recommendations on how to proceed in cases where the Commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair ...[6]

The Commission has been asked to inquire into and report on whether the Carry the Kettle First Nation has a valid claim for negotiation pursuant to the Specific Claims Policy. This report contains our findings and recommendations on the merits of this claim.

---

[5] Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991, reprinted in (1995) 3 ICCP 244-46.

[6] Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 15, 1993, reprinted in (1995) 3 ICCP 242-43.


Map 1
Alberta
Saskatchewan
Manitoba
Ontario
Fort Saskatchewan
Edmonton
Fort Pitt
Fort Calgary
Fort Macleod
Maple Creek
Fort Walsh
Fort Qu'Appelle
Regina
Fort Ellice
Winnipeg
LAKE OF THE WOODS
ROCKIES
Fort Benton
Montana
North Dakota
Bismarck
Minnesota
Duluth
Wisconsin
Michigan
Collingwood

Copyright © Indian Claims Commission Ottawa 2000

Prepared by Public History Inc Cartography by GIS Mapping

PART II

HISTORICAL BACKGROUND

The historical evidence in relation to the Carry the Kettle First Nation's claim, reviewed in this part, includes several volumes of documentary evidence and the oral evidence provided by members of the First Nation at two community sessions held in the Cypress Hills. The Commission also received sworn declarations of Olive Gordon, a report prepared by Dr Kenneth Ryan, a research report prepared by Jayme Benson on behalf of the Carry the Kettle First Nation, a report by Dr David Sauchyn, a report prepared by Jim Gallo on behalf of DIAND, Specific Claims, and a report prepared by Daniel Babiuk on behalf of the First Nation.

The Commission has also considered the written submissions of the First Nation and Canada, in addition to hearing oral submissions from legal counsel to the parties on May 5, 1999. The documentary evidence, written submissions, transcripts from the community sessions and oral submissions, and the balance of the record before the Commission in this inquiry are referenced in Appendix A to this Report.

CARRY THE KETTLE FIRST NATION

Carry the Kettle First Nation was once known as the Assiniboine Band. Its present reserve, Assiniboine Indian Reserve (IR) 76, is near Indian Head, Saskatchewan, 80 kilometres east of Regina. The Chiefs and headmen of the Assiniboine Band were associated with the Cypress Hills in 1877, when they adhered to Treaty 4, and in 1879, when they decided to select a reserve. They were Man Who Took the Coat, Long Lodge Tepee Hoska, Wich-a-wos-taka, and Poor Man. Man Who Took the Coat, Long Lodge, and their respective followers were settled at Indian Head by 1883. In 1885, after Long Lodge died, his group amalgamated with that of Man Who Took the Coat.[7] Members of Carry the Kettle First Nation consider themselves descendants of Man Who Took the Coat and Long Lodge.[8]

---

[7] Man Who Took the Coat thus emerged as the predominant Chief with respect to the origins of the Carry the Kettle Band. The Commissioners were reminded, however, at the May 30, 1997, community session that an Assiniboine Chief was not an "absolute ruler." Dr Kenneth Ryan's discourse on "Assiniboine Polity: Traditional

Man Who Took the Coat remained Chief until his death in 1891. At that time he was succeeded by his brother Carry the Kettle. Chief Carry the Kettle's name derives from a childhood incident when he carried a kettle while his band was being raided by enemies.[9]

Group around drum, including Carry the Kettle, Take the Coat, and Stabbed Many Times
(ICC Exhibit 8, photo 6)
Provincial Archives of Manitoba EM 464

Assiniboine Use and Occupation of the Cypress Hills

The Cypress Hills are 2,500 square kilometres of flat-topped uplands in southwestern Saskatchewan and southeastern Alberta. Surrounded by relatively barren flat land, they are the highest point in mainland Canada between

---

Assiniboine Government" made the point that an Assiniboine Chief "had no authority to act upon important Band business without first taking it to council" (ICC Exhibit 5, p. 14). This restriction was also stated in elders' testimonies prepared for the October 1997 community session (ICC Exhibit 9, question 2, p. 2), which elaborated on the requirements for leadership.

[8] ICC Transcript, May 30, 1997, p. 30 (Kaye Thompson); "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 1).

[9] "How Chief Carry the Kettle Got His Name" (ICC Exhibit 9, Document prepared by Carry the Kettle First Nation and displayed at community session 2, October 20, 1997).

Chief Carry the Kettle on horseback

(ICC Exhibit 8, photo 3)
Provincial Archives of Manitoba EM 28

Labrador and the Rocky Mountains. Being "a humid island in the semiarid prairies," they possess a rich mixture of plant and animal life that has supported human habitation for some 7,000 years.[10]

The Cypress Hills were frequented by various nations, including the Blackfoot, Cree, Gros Ventres, Saulteaux, and Assiniboine, nations that were sometimes friendly and sometimes mutually hostile.[11] Territorial disagreement did not preclude natural resource use by the contending nations,[12] and the fact that the Cypress Hills were not occupied exclusively by the Assiniboine Band is not at issue in this inquiry.

Historically, as many as 33 Assiniboine bands comprised the Assiniboine Nation.[13] Over the centuries the ancestors of these bands gradually migrated north and west from the headwaters of the Mississippi River until they occupied a vast territory ranging from Lake Winnipeg to the Rockies.[14] "At the peak of their power their territory ranged from the Saskatchewan and Assiniboine river valleys in Canada to the region North of the Milk and Missouri rivers in the US."[15]

---

[10] "Cypress Hills," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 560.

[11] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, pp. 5-7).

[12] Barry Potyondi, *In Palliser's Triangle: Living in the Grasslands, 1850-1930* (Saskatoon: Purich Publishing, 1995), 19-21.

[13] Kenneth Ryan, "Assiniboine Polity: Traditional Assiniboine Government," no date (ICC Exhibit 5, pp. 4-6).

Both the Cypress Hills and the Wood Mountains, southeast of the Cypress Hills, were used and occupied by several nations including the Assiniboine.[16] In a report for Canada in this inquiry, Jim Gallo linked Man Who Took the Coat with the Wood Mountains, but also concluded that, "by the early 1870s, the Wood Mountain Assiniboine frequented the Cypress Hills as winter camp sites and hunting grounds."[17] The parties to this inquiry agree that the Assiniboine were using the Cypress Hills prior to Treaty 4 and that they took treaty there in 1877.[18]

Olive Gordon, the daughter of Dan Kennedy, author of ***Recollections of an Assiniboine Chief,*** asserted that her father had always maintained that the Cypress Hills were the "permanent wintering ground of the Assiniboine tribes."[19] They were also their "sacred grounds" for ceremonies such as the Sun Dance in the spring.[20]

The presence of the lodgepole pine is likely one of the reasons so many nations were attracted to the Cypress Hills. The Cypress Hills mark the easternmost "outlier site" of the lodgepole pine, a tree that is found "from the Yukon through interior British Columbia, into western Alberta and southward."[21] The Hills were named after this pine, once commonly called "cypress."

---

[14] ICC Transcript, May 30, 1997, p. 30 (Kaye Thompson); "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 1); Ian A.L. Getty, "Assiniboine," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 6; Bill Yenne, *Encyclopedia of North American Tribes: A Comprehensive Study of Tribes from the Abitibi to the Zuni* (New York/Avenel, New Jersey: Crescent Books, 1986), 20-21; David Reed Miller, "Assiniboine," *Encyclopedia of North American Indians*, ed. Frederick E. Hoxie (Boston/New York: Houghton Mifflin Company, 1996), 56-57.

[15] Ian A.L. Getty, "Assiniboine," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 136.

[16] Thomas R. Ross and Tyrel G. Moore, eds., *A Cultural Geography of North American Indians* (Boulder: Westview Press, 1987), 69.

[17] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, pp. 14-15).

[18] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," prepared for Federation of Saskatchewan Indian Nations, November 27, 1998 (ICC Exhibit 11, pt I, pp. 6-12).

[19] Statutory Declaration of Olive Gordon, November 26, 1998 (ICC Exhibit 12, p. 2).

[20] Statutory Declaration of Olive Gordon, November 26, 1998 (ICC Exhibit 12, p. 2).

[21] John Laird Farrar, *Trees in Canada* (Markham: Canadian Forest Service/Fitzhenry & Whiteside, 1995), 3, 60-61.

Ancestral Connection to the Cypress Hills

The Commission twice visited the people of the Carry the Kettle First Nation to hear their oral history. The first visit took place in May 1997 at Maple Creek, Saskatchewan, and coincided with the Band's annual pilgrimage to the burial site of the Cypress Hills Massacre. We refer to the events of the 1873 massacre later in this report. It was at this first visit that Elder Kaye Thompson spoke of the Assiniboine people's connection to a territory they have always recognized as their "blessed homeland." She spoke about the "mountain by itself" (Wazixa-Wedum) as a "refuge," a source of abundant game and medicines, a positive influence on climatic conditions, the highest point bringing her people "closer to god."[22] She explained that the Cypress Hills were central to the life of the Assiniboine Band:

> This is our homeland, a place which sings harmoniously of such great and ancient ceremonies: Wa-hi-ki-ub, the calling of the spirits; the vision quest, important to gain more knowledge of the dreams; maga-ju wacipi, the raindance; hawi wacipi or wiwanka wacipi, the sundance, performed every year in the summer. It was in this area that the messenger to the great spirit, the mighty eagle, glided in perseverance throughout the open heavens and from whom we acquired the eagle feathers which endowed such significance in our cultural societies. It was the one area from which we could acquire our lodge pole, which was pertinent to the assembling of our lodges, our dwellings, our ceremonial structures. This area insured the continuity of our way of life, our way of existence.[23]

Through each generation the spiritual connection to the Cypress Hills is transferred to the people of the Carry the Kettle First Nation. The reverence with which the people speak of their territory is evident:

> Our heart is not here, our heart is in the Cypress Hills ... Our medicine people continued to return to this area for the purpose of acquiring needed roots, plants and paint. Pipe keepers have continued to offer the perennial ceremonies required for our dead relatives whom are left behind in the Cypress Hills ... The Cypress Hills is our area. We, as a people, have only really strong meaning in this place. Our cultural and spiritual health depends greatly on re-establishing a communication with this place ... Our people paid dearly for this land in Cypress Hills, through the blood of our dead relatives which has stained the grounds. After seeing the Cypress Hills, why would we want to move to the Indian Head area?[24]

---

[22] "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, pp. 2-3).

[23] ICC Transcript, May 30, 1997, p. 30 (Kaye Thompson); "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 1).

[24] ICC Transcript, May 30, 1997, p. 35 (Kaye Thompson).

Camp of Assiniboine Indians Boundary Commission (1872-74) 204 Collection
Provincial Archives of Manitoba N14128

In recognition of their connection to this territory, the elders explained their annual pilgrimage to the burial site constructed in the Cypress Hills after the massacre of their ancestors in 1873:

> Our people highly respect their burial sites. The burial site is holy land. The spirits around that place, in Cypress Hills, where our dead relatives were left behind. These ones, they say, kept the reserve. That's where they're laying.[25]

The massacre of the Assiniboine clearly evidences their occupation of the Cypress Hills as their "blessed homeland" in the days before treaty. When the treaty commissioners eventually arrived, Elder Kaye Thompson described the people's understanding of the treaty:

> The treaty is a sacred agreement made between two nations, of which mankind made an oath of peace to God. Our people will not defy the great spirit. Our children will continue to be taught that this peace must prevail. Our First Nation and the Queen's Nation agree to put down our guns and through our traditions we will continue to teach our children that they must live in harmony. This treaty will never be given up.

---

[25] ICC Transcript, May 30, 1997, pp. 24-25 (Kaye Thompson).

"Big Darkness," a medicine man

(ICC Exhibit 8, photo 4)
Provincial Archives of Manitoba EM 6

We were told never to sell anything that belonged to the treaty. For our people, today and in past generations, this concept was integral to our thought. That is why we cannot justify the notion that we are not permitted to live upon and occupy our reserve land in the Cypress Hills. The treaty indicated the government would look after our people and create reserves in our traditional territories. The treaty was signed and our reserve was selected at the head of the mountain. Our people had lived in this sanctified area for centuries. Like the Sioux Indians whom continually go back to the Black Hills of South Dakota, for us, the Assiniboine, we find this unique bond with the Cypress Hills. We were given this land through the spiritual way.[26]

---

[26] ICC Transcript, May 30, 1997, p. 29 (Kaye Thompson).

As the words of Elder Andrew Rider clearly indicate, the treaty is a sacred document and required the Crown to consult with the First Nation on the selection of its reserve. That the First Nation understood its people selected a reserve in the Cypress Hills was expressed by Andrew Rider:

> We are told by our forefathers that the Queen asked us to select a reserve in our traditional homeland, and the signing of the treaty this is what our leaders have done after consulting with our people, our traditional way. We recall the specific stories how our chiefs and warriors, men of leadership went with the Queen's men to select their traditional homeland. They always inhabited, even before treaty, the land that our chief chose for significance to our people to survive. We have done this from generation to generation.[27]

The Commission has been asked to inquire into the events surrounding the First Nation's selection of reserve land in the Cypress Hills and it is to those events that we will now turn.

Cypress Hills Massacre[28]

In the spring of 1873, a party of Cree stole horses from some American wolfers in Montana and set in motion the chain of events that culminated in the massacre of a group of Assiniboine a few weeks later in the Cypress Hills. The wolfers tried to follow the Cree to retrieve their horses, but lost the trail: the Cree headed towards Fort Whoop-Up in southern Alberta and the wolfers went the other way, arriving at the trading post of Abel Farwell in the Cypress Hills on the last day of May 1873.

At the time, three groups of Assiniboine were camped on the other side of Battle Creek, a short distance from Farwell's post. One group, under Chief Hunkajuka (Little Chief), were recent arrivals in the area, having made an arduous 480 kilometre trek from their camp on Battle River, looking for food to feed their starving members. Dan Kennedy described this trek:

> The hunting was good and meat was plentiful [at Battle River], but, as the winter wore on, buffalo was getting scarce, until, in the latter part of Amhanskam (Long Day Moon) February, the buffalo disappeared completely. They had to break camp and disperse. Chief Hankajuka [Little Chief] decided to lead his band of Assiniboines

---

[27] ICC Transcript, October 20, 1997, p. 17 (Andrew Rider).

[28] Most of the information about the Cypress Hills Massacre is taken from Walter Hildebrandt and Brian Hubner, *The Cypress Hill: The Land and Its People* (Saskatoon: Purich Publishing, 1994), chapter 4, and Dan Kennedy, *Recollections of an Assiniboine Chief*, edited and with an introduction by James R. Stevens (Toronto: McClelland and Stewart, 1972), 42-47.

> southward, in an effort to reach the Cypress Hills, a distance of almost three hundred miles as the crow flies. But the distance was even greater when the odds were all stacked up against them. However, there was no choice but to face the inescapable facts and meet the challenge.
>
> In their mad race with death across the blizzard swept plains, they ate their horses, their dogs and even the flint hides were roasted over the fires to be eaten. Whenever they came across their old camp sites they dug up the cast off bones from underneath the snow and were crushed and boiled for broth to sustain them.
>
> Their fight for survival was at along last over, so it seemed, when they reached Cypress Hills. The snow was practically all gone except for the snow drifts, which dotted the ravines and coulees, and there was every indication the buffalo were near.
>
> Cuwiknak eyaku (Took the Coat) was the lucky hunter to kill the first buffalo. From then on, hunting was good and their winter's ordeal was just a sad memory; sad because their trail was strewn with thirty of their kinfolk who perished from hunger and cold.[29]

Little Chief was soon joined by Chiefs Minashinayen and Inihan Kinyen and their followers, making an encampment of about 300 people.

Eashappie, son of Chief Inihan Kinyen and a Cypress Hills Massacre survivor, told the story of what happened on June 1, 1873:

> In the morning of the fateful day, my father had just returned from his visit to the Whiskey Traders, with the news of the arrival of ten American horsemen and the warning he had received that these men were looking for trouble.
>
> Immediately he instructed his followers to break camp, but 'Wincanahe,' an outspoken Indian, ridiculed and scoffed at their panic, and bluffed them into staying encamped.
>
> That morning whiskey flowed like water in the camps and by mid-day the tribesmen were all hopelessly drunk. Inside of our tent my father lay in a stupor and we employed every artifice, including herbs, to revive him to consciousness. I know the other camps were also in the same predicament, working frantically over their men, but it was hopeless; we were doomed. We were left defenceless.[30]

Estimates of the number of Assiniboine who died in the Cypress Hills Massacre range from 25[31] to 80,[32] but the deaths were only part of the atrocities of the day. Elder Kaye Thompson told us more about the "cruel bloodbath" that occurred:

---

[29] Dan Kennedy, draft for his book, "Recollections of an Indian Chief," attached to Supplementary Statutory Declaration of Olive Gordon, January 5, 1999 (ICC Exhibit 16).

[30] Dan Kennedy, *Recollections of an Assiniboine Chief*, edited and with an introduction by James R. Stevens (Toronto: McClelland and Stewart, 1972), 45.

[31] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971), [illegible].

[32] Dan Kennedy, *Recollections of an Assiniboine Chief*, edited and with an introduction by James R. Stevens (Toronto: McClelland and Stewart, 1972), 46.

Area of Cypress Hills Massacre, Battle Creek, Saskatchewan [ca. 1971]
Glenbow Archives NA-2446-12

> The massacre's onslaught occurred when our people were given poisoned whisky. Our people were slaughtered and killed like wild animals. The children had been abducted from their teepees, and then clutching them by their feet they were beaten savagely upon the ground. The women were brutally raped throughout the night, used and cast off. It has been told that a group of men had continually raped women all night in a camp near the massacre site. Our old people were beaten and left to die. The bones of our dead ancestors were left scorching the prairies, instilling antagonizing threats of fear into our forefathers of the white man's bitterness.[33]

ESTABLISHING ORDER IN THE CYPRESS HILLS, FORT WALSH, 1875 TO 1883

The North-West Mounted Police (NWMP), a paramilitary police force, was set up in 1873 as a result of the massacre and the general conditions to assert Canadian law and sovereignty in the North-West.[34] Troops were dispatched to "Whoop-Up" country, and Fort Macleod and Fort Walsh were constructed on either side of what later became the Alberta/Saskatchewan border.[35] In 1875, the *North-West Territories Act* was passed to provide for the establishment of government institutions in the region.[36]

---

[33] ICC Transcript, May 30, 1997, pp. 24-25 (Kaye Thompson).

[34] "North-West Mounted Police," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 1511.

Superintendent James Morrow Walsh's troops began building the fort that bore his name in the centre of the Cypress Hills, near the site of the Cypress Hills Massacre, in spring 1875.[37] During the late 1870s and early 1880s, the period during which the buffalo were being eliminated, Fort Walsh played an important role in the history of the North-West. Cecil Denny, an original member of the NWMP who served as Indian agent at Fort Walsh in 1881–82, described the circumstances as follows:

> This region was infested by whiskey traders. It was a favourite hunting ground for many Indian tribes, and they were continually coming in conflict. Horse stealing was rife. Briefly, it was about as lawless a section as could be found in the territory. It was to put an end to this state of affairs that Fort Walsh was established in the summer of 1875. Major Walsh and his troop soon stamped out the whiskey trade, and did much to gain the goodwill of the various Indian tribes that were accustomed to visit the fort.[38]

Fort Walsh was near the American boundary; therefore, many Indians from the United States hunted in the vicinity. Denny believed that stationing the NWMP at Forts Walsh and Macleod likely "prevented the American Indians from using Canadian soil as a base of operations for prosecuting the war with the United States troops."[39]

In the United States, the southernmost herds of buffalo had been destroyed by 1875 and those on the American Plains were eliminated by 1883. Buffalo had ranged across the future states of Mississippi, Tennessee, Kentucky, the Carolinas, Virginia, Georgia, Ohio, Indiana, and Illinois in the 1700s. They were slaughtered in the name of progress and civilization in the United States, and finally disappeared from Canada, owing to "economic exploitation," in the late 1880s.[40]

---

[35] David Reed Miller, "Assiniboine," *Encyclopedia of North American Indians*, ed. Frederick E. Hoxie (Boston/New York: Houghton Mifflin Company), 57.

[36] "North-West Territories Act," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig 1988), 1513.

[37] "Cypress Hills," *The Canadian Encyclopedia*, 2nd. ed. (Edmonton: Hurtig, 1988), 560. Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994), 69-73. On the subject of how many died in the Cypress Hills Massacre, Hildebrandt and Hubner say numbers are "uncertain."

[38] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 76.

[39] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 97. In the United States, Indians' treaty rights were being violated by actions such as prospectors entering the Black Hills. Once the Sioux and Cheyenne had retaliated by wiping out Lt.-Col. Custer and the 7th Cavalry on June 25, 1876, thousands of Sioux fled north from Montana. NWMP at Fort Walsh therefore became involved in mediating between the Sioux and the various other tribes in the area.

After 1873, no large numbers of buffalo were seen in the Wood Mountain district. In 1875–76, only straggling herds were found east of the Cypress Hills.[41] For the aboriginal peoples of the area, travelling from southwestern Saskatchewan to hunt buffalo in Montana around the Milk River was a necessary and often futile search for food.

The federal presence at Fort Walsh, in the form of the NWMP, survey parties, and the Indian administration, generated a lively economy in the Cypress Hills at least for a few years. The fort attracted retail merchants, Indians, and Métis and it facilitated the conversion of treaty annuities into goods.[42] By 1883, when Fort Walsh was abandoned, treaties had been made throughout the Canadian prairies, the Canadian Pacific Railway had been built to Calgary, and the Assiniboine Band had been settled at Indian Head.[43]

TREATY 4, 1874

When the Dominion of Canada acquired Rupert's Land from the Hudson's Bay Company (HBC) in 1870, it intended to promote western settlement and to construct a railway to the Pacific, using western natural resources and lands to pay for it.[44] To open the required lands, the government initiated, in 1871, a series of treaties with the Indian occupants of the southern section of the North-West Territories.

By this time, Indians from Lake of the Woods to the Rockies were eager for a means to protect their own interests.[45] They were concerned about the consequences of the sale of their lands by the HBC, developments in the United States and Canada, the depletion of animals on which they depended,

---

[40] Valerius Geist, *Buffalo Nation: History and Legend of the North American Bison* (Saskatoon: Fifth House Ltd., 1996), 97-98.

[41] Barry Potyondi, *In Palliser's Triangle: Living in the Grasslands, 1850-1930* (Saskatoon: Purich Publishing, 1995), 31.

[42] Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994), 78.

[43] "Fort Walsh," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 823, and Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994), 114. By 1883, the majority of the Sioux had returned to the United States. After Fort Walsh was abandoned, non-aboriginal settlers ranched the property until the 1940s, when the RCMP (formerly NWMP) reacquired it for raising horses. The Fort Walsh property was transferred to Parks Canada in 1968. It became a national historic site of 650 hectares (1,605 acres) in 1972.

[44] "Dominion Lands Policy" and "Railway History," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 612 and 1822. In 1871, British Columbia entered Confederation on the promise of a transcontinental rail line being completed within 10 years.

[45] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), vi-vii.

Cypress Hills, NWMP Camp [c. 1878] Zachary M. Hamilton, M 10 Collection
Provincial Archives of Manitoba N13818

and encroachment by surveyors and settlers.[46] By 1873, Treaties 1, 2, and 3 took in an area along the international border that now runs almost from Thunder Bay, Ontario, to Estevan, Saskatchewan, at an average depth of some 300 kilometres from the border.

The rapid rate at which buffalo were disappearing at this time impoverished the prairie Indians. It also raised fears of starving Indians with the government and settlers. Lieutenant-Governor Alexander Morris, who had negotiated Treaty 3, was ready to make another treaty further west and promoted the idea of sending mounted police to control the activities of illicit traders.[47] On receiving assurances that Indians in the Qu'Appelle Valley region were willing to treat, he secured approval to proceed there.[48]

---

[46] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 4.

[47] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 1-3. Alexander Morris was appointed lieutenant-governor of Manitoba and the North-West Territories in 1872; he was the senior government negotiator of Treaties 3 to 6.

[48] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 4-9.

On September 8, 1874, the treaty party arrived under military escort at Fort Qu'Appelle, 70 kilometres northeast of Regina.[49] The party consisted of Lieutenant-Governor Morris as spokesperson; David Laird, Minister of the Interior and Indian Commissioner; and William J. Christie, formerly of the HBC's Saskatchewan District and soon to be Indian Commissioner for the North-West Territories.[50] Discussions went on for several days, partly because of tribal differences among the Cree, Saulteaux, and Assiniboine.[51] The Indians sought answers to their questions and concerns about the changeover from HBC authority; for his part, Morris was bent on securing a treaty for Canada without delay:

> The Company and its relationship to the land seemed to be the focal point of the dissension amongst the Indians themselves as well as the barrier to making a treaty. Morris frequently showed insight in understanding the Indian viewpoint, but was becoming impatient with the persistent questioning about the Company. He did not see the connection between the Indians' concern about the Company and what they were doing in attempting to make a treaty. The Indians saw the country as their own which the Company had no right to sell. Morris saw the land as belonging to the Queen. She had paid the Company for whatever rights they had held there and was now prepared to extinguish aboriginal title as well. This basic misunderstanding about the land cession aspect of the treaty was never brought to the surface and resolved in the Treaty Four discussions, although it lay behind the questioning which occupied most of the time.[52]

To win the Indians over, Morris began the treaty negotiations by offering agricultural assistance: "When fish are scarce and the buffalo are not plentiful she [the Queen] would like to help you to put something in the land."[53]

On September 15, 1874, despite the divisions between the Cree and the Saulteaux and the absence of most of the Assiniboine at the negotiations, the terms of the treaty were finalized.[54] Treaty 4, also known as the "Qu'Appelle Treaty," saw the "Cree and Saulteaux Tribes of Indians, and all other the

---

[49] "Fort Qu'Appelle," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988). Fort Qu'Appelle was an HBC post at the site of an Anglican mission that had begun there in 1854. After 1875 it was an NWMP outpost.

[50] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 8.

[51] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 9.

[52] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 13-14.

[53] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 11.

[54] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 18-20.

Indians [sic] inhabiting the district," cede a 194,000 square kilometre area (75,000 square miles),[55] encompassing most of the Assiniboine's traditional territories on the Canadian side of the border. In today's terms, Treaty 4 covered nearly all of southern Saskatchewan to the international border, extending as far west as Medicine Hat, Alberta, and as far east as Lake Winnipegosis in Manitoba. At its centre was Regina, Saskatchewan.[56] There was little discussion about reserve lands during the six-day treaty conference. Morris simply indicated: "When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons, and on commencing to farm the Queen will give to every family cultivating the soil two hoes, one spade, one scythe for cutting the grain, one axe and plough, enough of seed wheat, barley, oats and potatoes to plant in the land they get ready."[57]

According to Treaty 4, Indian reserves were to be selected in consultation with the Indians concerned and were not to be disposed of without their consent:

> Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be *selected* by officers [of] Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of Indians*, and to be of sufficient area to allow one square mile for each family of five ... [and] that the aforesaid reserves of land ... may be sold, leased or otherwise *disposed of* by the said Government for the use and benefit of the said Indians, *with the consent of the Indians* entitled thereto first had and obtained ...[58]

Indians were not permitted to sell their reserve lands, but Canada reserved the right to expropriate reserve lands with compensation.[59] The Indians retained a limited "right to pursue their avocations of hunting, trapping and fishing throughout the tract surrendered."[60]

Bands "now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land," were to be given "once and for all" certain specified farm tools and seed on a per family basis.[61] The treaty also required a census "of all the Indians inhabiting the tract" and the commencement of annuity payments, as well as a one-time and also yearly distribution of goods. After the September 15, 1874, signing at Fort Qu'Appelle, six adhesions followed at other locations on September 21, 1874; September 8, September 9, and September 24, 1875; August 24, 1876; and September 25, 1877.[62]

---

[55] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971), 77 (ICC Documents, p. 1).

[56] Canada, *The Canadian Indian* (Ottawa: DIAND, 1990), 58.

[57] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971), 96 (ICC Documents, p. 11).

[58] Quoted in John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 44. Emphasis added.

[59] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 45.

[60] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 45; and Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971), 330-35 (ICC Documents, pp. 29-38).

Assiniboine Council near Fort Walsh, Saskatchewan, 1878
Glenbow Archives NA-936-34

In 1875, W.J. Christie was appointed Indian Commissioner "to select the Reserves where they shall be deemed most convenient and advantageous for the Indians, each reserve to be selected as provided by the treaty after conference with the bands of Indians interested therein, and subject to the other conditions set forth in the treaty." A surveyor, who was to proceed in a manner recommended by the Surveyor General, was placed at his "disposal" for this purpose.[63]

---

[61] John Leonard Taylor, *Treaty Research Report: Treaty Four (1874)* (Ottawa: Indian and Northern Affairs Canada, 1985), 45. Information acquired through ICC's inquiry into the Kawacatoose First Nation's treaty land entitlement claim suggests that at least one agent was hesitant to provide livestock until the band, in his estimation, was ready. He advised a band that was unwilling to have its reserve surveyed in the absence of one of the band's headmen that "they would receive no cattle nor anything else except their rations, ammunition, twine and tobacco as the treaty provided that until they had their reserves marked out and had stables and hay for the cattle they were not to get any."Angus McKay, Indian Agent, Department of Indian Affairs, to Superintendent General, Department of Indian Affairs, October 14, 1876 (ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kawacatoose First Nation* [Ottawa, March 1996], ICC Exhibit 1, p. 82).

[62] Alexander Morris, *The Treaties of Canada with the Indians* (Toronto, 1880; reprint Toronto: Coles, 1971), 330-35 (ICC Documents, pp. 29-38).

As of 1876, the Indian Affairs Branch's North-West Superintendency was responsible for administering the affairs of some 17,000 treaty Indians, most of whom depended on the buffalo for their subsistence.[64]

Assiniboine Adhesion to Treaty 4, 1877

The Assiniboine at Fort Walsh were the last to sign Treaty 4. They were the largest group of Assiniboine to adhere to Treaty 4, but they did not sign until September 25, 1877, fully three years after the treaty began at Qu'Appelle.[65] The Assiniboine's adhesion was taken by the commander of the fort, NWMP Inspector Major James M. Walsh. It was witnessed by Constant Provost, who explained it, and Sub-Inspectors J.H. McIllree and Percy Reginald Neal, both of the NWMP.[66]

The census, taken between September 19 and 23, 1877, named the bands assembled at Fort Walsh and sorted out individuals according to whether they were British Indians or American Indians. There were, in total, 296 lodges: 189 Assiniboine, 60 Saulteaux, and 47 Cree at Fort Walsh that September.[67] Approximately "one hundred and forty-five (145) lodges of Assiniboine ... had never given adhesion to any previous treaty nor received payment."[68] When they adhered to the treaty on September 25, 1877, they made it known to Walsh that their territory included the Cypress Hills:

> The country claimed by the Assiniboine, admitted in treaty this year by me as the country of their forefathers, extends from the west end of Cypress Mountain to Wood Mountain on the east, north to the South Saskatchewan and south to Milk River.

---

[63] Order in Council, July 9, 1875, and Instructions to W.J. Christie, July 15, 1875, National Archives of Canada (hereafter NA), RG 10, vol. 3622, file 5007, as cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 21).

[64] Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994), 106-07.

[65] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), adhesion by Assiniboine, 13-14 (ICC Documents, pp. 27-28).

[66] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), adhesion by Assiniboine, 13-14 (ICC Documents, pp. 27-28). Five years later, as acting Indian agent at Fort Walsh, McIllree dedicated his efforts to pressuring virtually all Indians, including the Assiniboine Band, out of the Cypress Hills and to closing Fort Walsh.

[67] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[68] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42). Man Who Took the Coat, who had 69 lodges, had been a treaty Indian since 1875, but it is not known with which band.

> Since my arrival in this country they have not gone further east than forty (40) miles east of the east end of Cypress Mountain, this is owing to the large number of Sioux in that locality whom the Assiniboine do not care to be intermingling with. The other sections of the country mentioned have been occupied by them for the last two (2) years, one-half have wintered on the Canadian side of the line on Milk River, the other half at the west end of the mountain.[69]

That the Cypress Hills were Assiniboine territory, Walsh made known to Minister of the Interior Meredith in an October 1877 report.[70]

When they adhered to Treaty 4, the Assiniboine Band members were represented by Man Who Took the Coat,[71] Long Lodge Tepee Hoska, Wich-a-wos-taka, and Poor Man. Their names and marks appear on a short document, attached to a copy of the treaty, which reads, in part:

> We, members of the Assiniboine Tribe of Indians ... transfer, surrender and relinquish ... all our right, title and privileges whatsoever which we and the bands which we represent have held or enjoy, of, in and to the territory described and fully set out in the said articles of treaty.[72]

In a letter to the Deputy Minister of the Interior, Walsh reported on how the young Man Who Took the Coat, the elderly Long Lodge, and Poor Man came to be Chiefs of the Assiniboine Band in 1877:

> After Mr. Allen had completed taking the census I found that more treaty Indians were divided into three Bands, sixty-nine (69) lodges under the "Man who took the Coat," forty-two (42) lodges under "Long Lodge," and thirty-four (34) lodges under the "Poor Man." The "Man who took the Coat" has been a treaty Indian since 1875, and a head soldier to the "Little Black Bear" (Cree). He is a young man of twenty-two (22) years of age, and at the present time the most influential Indian in this section. He is an exceedingly good man and very obedient to the law.
>
> The forty-four (44) lodges of Assiniboine who had drawn annuities previously with the "Little Black Bear" told me they wanted a Chief of their own tribe added to this number: there were sixty nine (69) Lodges of Non-Treaty Indians who made a similar request. At the solicitation of such a large number of persons I consented to allow the Assiniboine who had formerly gone with "Little Black Bear" to withdraw from the latter's band, and knowing the "Man Who Took the Coat" to be a good man, and one

---

[69] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[70] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[71] Also known as The One That Fetched the Coat (aka The-Man-Who/That-Took/Fetched/Stole-the-Coat or "Jack").

[72] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), adhesion by Assiniboine, 13-14 (ICC Documents, pp. 27-28).

> on whom the Government could depend, I consented to their request, and allowed them to elect him their Chief. I then allowed him to appoint two (2) Head men. "Long Lodge," an old and recognized Chief of the Assiniboine for a great many years had only forty-two (42) Lodges. This number said they did not want to see him thrown to one side and not admitted by the "White Mother" as a Chief, that he was now getting old and had always been a good friend to his people and the Whites.
>
> Since my arrival here "Long Lodge" and camp (altogether considered notorious before the arrival of the Police) have been most obedient to the law. The "Poor Man" much the same as "Long Lodge's" camp, is very much reduced owing to the objection that many of his followers were American Indians; he has at present thirty-four (34) lodges; he is a good man and very friendly to the Whites; his people said they would not join any other Chief, and if I could not admit him as such, to pay them by themselves. As the Act states that every Band composed of thirty (30) Indians was entitled to a Chief, I allowed them to elect him as such.[73]

The Indian Claims Commission has not been provided with any further information about Long Lodge's background; however, it is known that, when adhering to Treaty 4, Long Lodge reminded Walsh that, the previous year, Walsh had refused to take the adhesion of his band and others without authorization from the Superintendent General of Indian Affairs. Walsh agreed to take this delay into account and to pay them for the previous year as well.[74]

Since Walsh was concerned about the confusion arising from the bands of Little Black Bear (Cree) and Little Child (Saulteaux) going to Qu'Appelle for their annuities, he wrote: "The Assiniboine must be paid here [in the Cypress Hills], ***this being their country*** and the majority of them could not be induced to go elsewhere."[75] Even though efforts were subsequently made to send them elsewhere, the "Assiniboine Band" was paid treaty annuities at Fort Walsh every year from 1877 to 1882.[76]

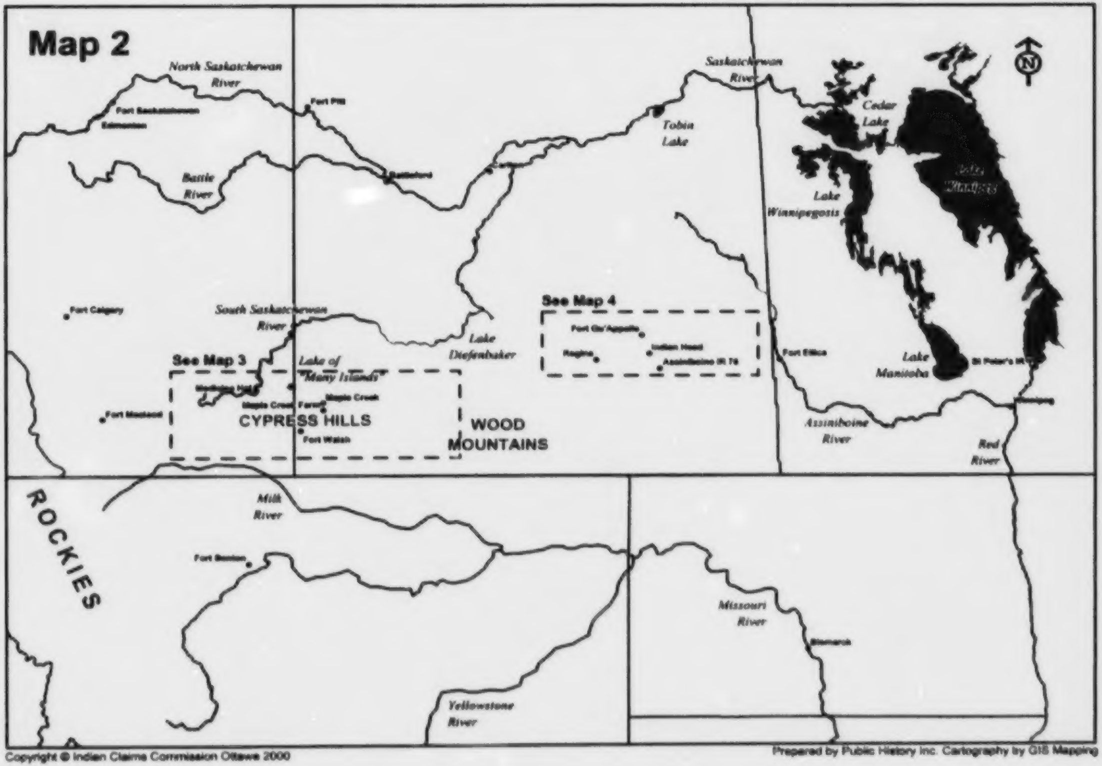
---

[73] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[74] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[75] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42). Emphasis added. In this report, Walsh describes Little Child as "Chief of the Saulteaux"; subsequent reports by Dewdney refer to Little Child as Cree.

[76] Only a few annuity paylists were supplied in this inquiry; the ICC did not receive a coherent set. See for 1877 and 1878: Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 133. See for 1879: January 2, 1880, Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51), and annuity paylists, NA, RG 10, vol. 9413, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 31). See for 1880: Report of Irvine, December 29, 1880, in Canada, "Annual Report of the Commissioner of the NWMP, 1880," in *Sessional Papers*, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt 1, p. 9). See for 1881: Superintendent General of Indian Affairs to Governor General, December 31, 1881, Canada, Parliament,


Map 2
N
North Saskatchewan River
Fort Saskatchewan
Edmonton
Fort Pitt
Battle River
Battleford
Saskatchewan River
Tobin Lake
Cedar Lake
Lake Winnipeg
Lake Winnipegosis
Lake Manitoba
St Peter's IR
Fort Ellice
Winnipeg
Assiniboine River
Red River
See Map 4
Fort Qu'Appelle
Indian Head
Regina
Assiniboine IR 76
Fort Calgary
Fort Macleod
South Saskatchewan River
Lake Diefenbaker
See Map 3
Lake of "Many Islands"
Medicine Hat
Maple Creek
Maple Creek Farm
CYPRESS HILLS
Fort Walsh
WOOD MOUNTAINS
ROCKIES
Milk River
Fort Benton
Missouri River
Bismarck
Yellowstone River

Copyright © Indian Claims Commission Ottawa 2000

Prepared by Public History Inc. Cartography by GIS Mapping

APPOINTMENT OF EDGAR DEWDNEY AS INDIAN COMMISSIONER, 1879

By the time the members of Assiniboine Band were ready to select their reserve in 1879, Edgar Dewdney had replaced W.J. Christie as Indian Commissioner. Dewdney, an English-born civil engineer, surveyor, and politician, became Indian Commissioner in May 1879.[77] In the mid-1860s, he had supervised the construction of the "Dewdney Trail," a route to the British Columbia interior "for the British to maintain control over the growing gold-mining interests in the region."[78] He had been elected to the Legislative Council of British Columbia in 1870 and, from 1872, had served as a Conservative Member of Parliament for Yale, British Columbia.[79]

The year before Dewdney's appointment as Indian Commissioner, the Conservative Party under leader Sir John A. Macdonald had been elected to bring about tariff protection for Canadian manufacturers. In March 1879, Macdonald's government launched the "National Policy" which, during the 1880s, became synonymous with constructing the Canadian Pacific Railway and promoting western settlement.[80] During the same period, Dewdney's name became intimately connected to the implementation of Indian Affairs' policies in the west; he took his instructions directly from Macdonald, who was also the Minister of the Interior.[81]

This reorganization of the "system of administering Indian matters in the North-West"[82] depended on the appointment of "a gentleman of ability and experience, in whose judgment the Government had perfect confidence."[83]

Sessional Papers, 1882, No. 6, vii-viii (ICC Documents, pp. 86-87), which is also at John A. Macdonald, Superintendent of Indian Affairs, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), vii, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9). See for 1882: McDonald to Dewdney, November 11, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 313-15).

[77] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xii (ICC Documents, p. 45). Dewdney's position was confirmed by an Order in Council of May 30, 1879. Dewdney's predecessors were Christie, McKay, and Liard. Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, p. 26).

[78] "Sir Edgar Dewdney" and "Dewdney Trail," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 591.

[79] "Sir Edgar Dewdney" and "Dewdney Trail," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 591.

[80] "National Policy," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 1432.

[81] Macdonald memo, May 16, 1879, NA, RG 10, vol. 3686, file 13364, in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 24).

[82] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xii (ICC Documents, p. 45).

[83] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xii (ICC Documents, p.45).

Dewdney, therefore, had "large discretionary powers"[84] to "direct his subordinates at the different Agencies."[85] He was also required to choose the location of 19 "farming agencies," which Macdonald stated should "lead in due course to the abandonment by the Indians of the hunt, and their settlement upon their reserves."[86]

By the time of Dewdney's appointment, Indians had already starved to death at Qu'Appelle, Fort Walsh, Fort Macleod, Battleford, Carlton, Fort Pitt, Fort Saskatchewan, Edmonton, Touchwood Hills, Fort Ellice, Moose Mountain, Fort Calgary, and elsewhere.[87] Despite the Indians' perilous circumstances, relief was meted out by the Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, on the condition that his Indian agents "require labor from able-bodied Indians for any supplies given them" so they would learn "they must give something in return of what they receive."[88]

At the same time, officials at Indian Affairs headquarters were keenly aware of the immediate perils of completely ignoring the desperate condition of Indians:

> There is little doubt that had supplies not been sent many more of these poor creatures would have perished, or they would have been driven by desperation to help themselves at the expense of the white settlers of the country. The only wonder is that they did not do so before the relief reached them.[89]

The Indians reportedly were grateful for government help, which was given almost with a sense of relief if not gratitude:

> [T]he patience and endurance displayed by the Indians of the North-West Territories, under trying circumstances in which they were placed, are beyond all praise, and their refraining from helping themselves at the expense of the white inhabitants of the country, even when pressed with hunger, and pained by the sight of some of their

---

[84] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xii (ICC Documents, p. 45).

[85] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xii (ICC Documents, p. 45).

[86] Report of John A. Macdonald, Minister of the Interior, in Canada, *Annual Report of the Department of Interior for the Year Ended 30th June 1879* (Ottawa, 1880), xiii (ICC Documents, p. 46).

[87] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, December 31, 1879 (ICC Documents, p. 47).

[88] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, December 31, 1879 (ICC Documents, p. 47).

[89] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, December 31, 1879 (ICC Documents, p. 47).

> friends dying around them and others greatly reduced in strength, entitles them to every consideration at the hands of the public.[90]

Dewdney launched the model or home farm system on reserves, but soon lobbied for the idea of central supply farms instead. There were eight farming instructors in Treaty 4 by January 1882, but, by that time, Dewdney was already planning to dispense with those in the eastern part of the Treaty 4 area.[91] Ultimately the Macdonald government phased out the model farm plan altogether.[92]

SELECTING THE ASSINIBOINE RESERVE SITE, CYPRESS HILLS, 1879

On June 26, 1879, less than a month after his May 30 appointment, Indian Commissioner Dewdney arrived at Fort Walsh via Collingwood, Duluth, Bismarck, and Fort Benton.[93] He found "the reports as to the scarcity of buffalo had not been exaggerated, and numbers of Indians of the Cree, Assiniboine and Blackfeet were awaiting the arrival of Col. MacLeod and myself. ... They were anxious to know what the government intended to do to assist them and begged for food to take them to the buffalo, which they expected to find near the Boundary line."[94] Commissioner James Farquharson Macleod of the NWMP, who accompanied Dewdney, explained that Dewdney had been sent by the government to devote his whole time to their interests and "to show them how to live";[95] that is, the government expected them to "work and earn their own living."[96]

Dewdney remained at Fort Walsh until July 6, 1879. He met with different bands to explain the government's policy and "advised them to select their

---

[90] L. Vankoughnet, Deputy Superintendent General of Indian Affairs, to Superintendent General of Indian Affairs, December 31, 1879 (ICC Documents, p. 48).

[91] Edgar Dewdney to Superintendent General of Indian Affairs, January 1, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 38, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

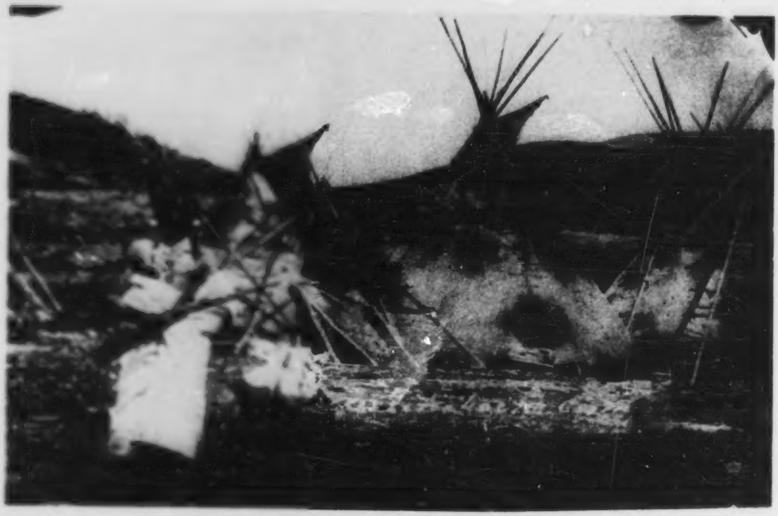
[92] Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994), 108.

[93] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[94] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[95] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[96] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).



Assiniboine Camp in the Cypress Hills [ca. 1878]

Glenbow Archives NA-790-4

land and settle on their reserves."[97] He told them he "had brought two farmers [Taylor and Wright] with [him] who would at once commence to break up the soil and raise crops to furnish them with seed and food while at work on their own reservations."[98] He reported to Macdonald that "[a]ll the Indians expressed great satisfaction at what I told them, and two of the principal chiefs 'The Man-that-Stole-the Coat', an Assiniboine, and 'Little Child', a Cree, at once expressed a desire to select their land and settle down."[99]

The 747 Assiniboine "for whom the reserve in the Cypress Hills was intended" were paid treaty annuities at Fort Walsh in September 1879.[100] The Assiniboine verbally selected the site for their reserve when they first met Dewdney in June 1879. It was not until October 26, 1879, that Dewdney actually visited "the locality that the Assiniboine Chief had notified me in the spring [late June or early July 1879] that he would like for his reservations." About the same time, he assigned John J. English, of Omemee, Ontario, to start a farm on the "Assiniboine Reserve." Nevertheless, Dewdney acknowledged the matter of early frosts there as soon as he saw the site, roughly 20 miles west of Fort Walsh:

---

[97] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[98] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[99] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, 76-77 (ICC Documents, pp. 50-51).

[100] Annuity paylists, NA, RG 10, vol. 9413, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 31).

> It is situated on the north-west end of Cypress Mountains, and is well located for farming, provided early summer frosts are not prevalent. As no crop of any kind has ever been put in this locality, it is difficult to say how it may turn out. It has been a favorite wintering place for Half-breeds for several years, and there are a number of abandoned houses, which will be made use of by the Indian instructor sent there, as well as by the Indians themselves.[101]

English had a farm taking shape at the Assiniboine Reserve by the summer of 1880 when the surveyor, Allan Poyntz Patrick, was ready to survey it according to Dewdney's instructions.[102] Dewdney, reporting on the North Assiniboine who wanted to settle in the Wood Mountains and on the [South] Assiniboine Band who wanted to settle in the Cypress Hills, made it clear in January 1880 that the "Assiniboine have not, as yet, settled on their reservations."[103]

Assiniboine Reserve, Little Child's Reserve, and Farming Agencies, 1879–80

In the fall of 1879, Dewdney assigned the following farming instructors for the Southern District:

> Mr. Setter, east of the Cypress Hills [60 miles from Fort Walsh], on the Cree [Little Child's Maple Creek] Reservation. I consider this an excellent appointment as he speaks the language fluently himself, and has been accustomed to Indians the greater part of his life. Mr. English I despatched to the Assiniboine Reservation [west end of Cypress, 20 miles from Fort Walsh]; Mr. Bruce, Piegan Reservation, and Mr. Patterson to the Blackfoot Crossing.[104]

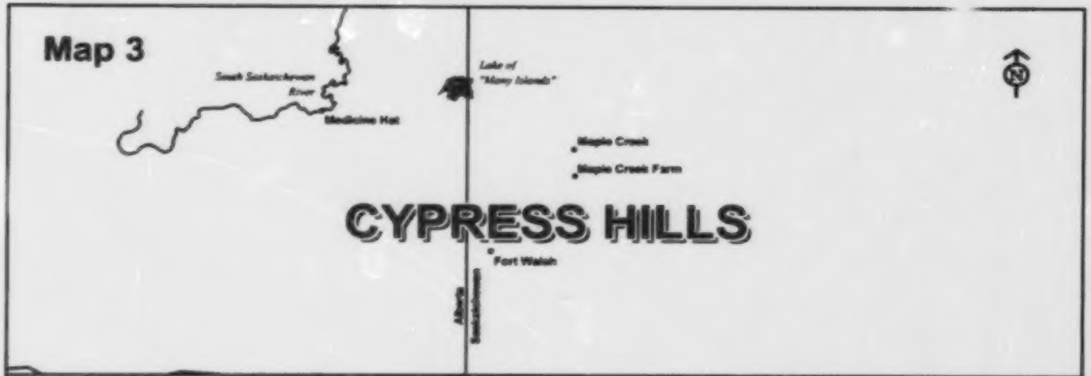
---

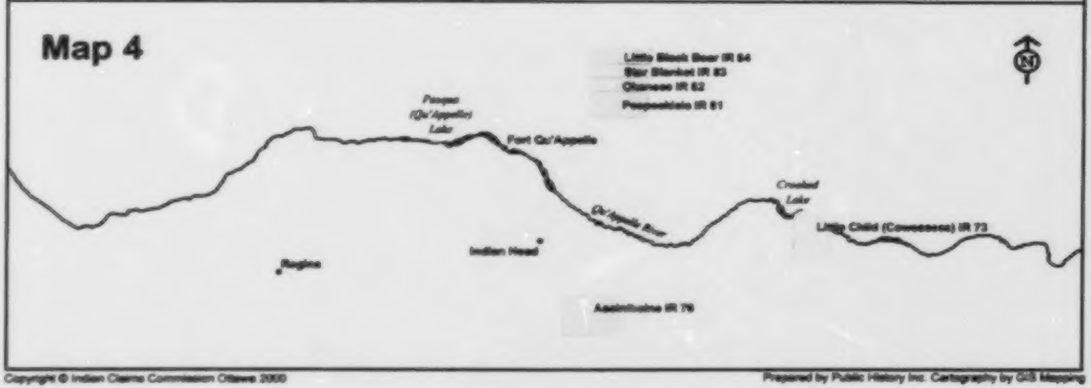
[101] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 95 (ICC Documents, p. 54).

[102] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 99 (ICC Documents, p. 58).

[103] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 97 (ICC Documents, p. 56).

[104] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 96 (ICC Documents, p. 55).


Map 3
South Saskatchewan River
Medicine Hat
Lake of "Many Islands"
Maple Creek
Maple Creek Farm
CYPRESS HILLS
Fort Walsh
Alberta
Saskatchewan


Map 4
Little Black Bear IR 84
Star Blanket IR 83
Okanese IR 82
Peepeekisis IR 81
Pasqua (Qu'Appelle) Lake
Fort Qu'Appelle
Qu'Appelle River
Crooked Lake
Little Child (Cowessess) IR 73
Indian Head
Regina
Assiniboine IR 76

Copyright © Indian Claims Commission Ottawa 2000

Prepared by Public History Inc. Cartography by GIS Mapping

This information appeared in chart form in the 1879 *Annual Report of the Department of the Interior*, but Dewdney qualified it with a note stating: "It may be found by and bye that it will be desirable to alter the location of some of these."[105]

The location of Little Child's reserve was most in question at that time. Little Child had indicated to Dewdney in the spring of 1879 that he had wanted his reserve about 20 miles east of Fort Walsh (near the future town of Maple Creek), "but on visiting it and finding timber was very scarce, he [Little Child] thought he would prefer it up Battle River, the creek upon which Fort Walsh is built."[106] Dewdney agreed, providing "the country was capable of raising crops."[107] Being unable to visit this locality in October 1879, Dewdney sent Setter to see it, but Setter "did not appear to think favorably of the location, so [Dewdney] instructed him to make but very slight improvements, as [Dewdney] expected different arrangements would be necessary in the spring [of 1880]."[108] The location Setter saw likely was the spot Little Child had chosen on Battle River, for, in November 1879, Dewdney inspected Little Child's reserve, "to which I had appointed Mr. Setter, and found it was totally unfit for a farming agency or an Indian reservation."[109] Dewdney therefore redirected Setter "to the valley near the police station ... east of the Cypress Hills" and ordered Little Child to inspect that location (near the future town of Maple Creek) and "inform Mr. Setter if he was satisfied with it."[110] What Little Child's feelings about this location were in 1879 is not known, but by 1881 he was not content there.

Dewdney had originally intended to assign English to Fort Macleod, but circumstances led to his reassignment to work with the Assiniboine Band. The farming instructor's two-month trip west from Winnipeg via the Missouri

---

[105] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 99 (ICC Documents, p. 58).

[106] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 95 (ICC Documents, p. 54).

[107] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 95 (ICC Documents, p. 54).

[108] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 95 (ICC Documents, p. 54).

[109] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 96 (ICC Documents, p. 55).

[110] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 96 (ICC Documents, p. 55).

River[111] had brought him to Fort Walsh late in October 1879, when there was already snow on the ground.

On January 2, 1880, Dewdney recommended that a Fort Walsh Agency be established with an additional Treaty 4 agent.[112] There was only one agent, Agent Alan McDonald, at Swan River, with sole responsibility for the entire Treaty 4 area, but his location was in the easternmost part. It was not until September 13, 1880, that Edwin Allen became the first Indian agent based at Fort Walsh.[113]

In a lengthy letter to the editor of the Omemee *Herald*, his home newspaper, English explained what happened on his arrival:

> We remained in our tents for three days waiting the arrival of the Commissioner to send us to our different reservations. My appointment was for Fort McLeod [sic], 180 miles further west, but the Commissioner thought as I had my family along, and as the season was late, I had better remain here and take the Assiniboine Reservation, which is situated at the head of Cypress Mountain, a distance of 18 miles from the Fort ... I went up to the reservation in a few days and on it found quite a number of houses unoccupied, so I took possession of one for the present and here made the acquaintance of eight young English gentlemen, just out from the Old Country, who had come West to start farming and stock-raising. They also took possession of one of the houses and remained all winter, so between the Fort and farm I spent the winter, my man remaining on the reservation all the time, in case any Indians should come hungry to feed them; but we had not any until about the end of April, when they commence to arrive.[114]

Consequently, English's appointment as the farm instructor at the site selected by the Assiniboine Band in the fall of 1879 preceded by about a year Allen's arrival as the Indian agent at the fort.[115] In spite of snow remaining on the ground until May 1, 1880, being incapacitated for weeks when his knee was kicked by an ox, and having to replace his assistant, English was not discouraged:

---

[111] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 38-39.

[112] Edgar Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 101 (ICC Documents, p. 60).

[113] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1879* (Ottawa, 1880), in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10A and 10B, vol. 1, doc. 2).

[114] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 38-39.

[115] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 30th June 1879* (Ottawa, 1880), in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 2).

> The assistant Commissioner [likely E.T. Galt] paid me a visit a short time ago and was well pleased with the result of my labour. To use his own words in a letter he sent me from the Fort shortly after his visit, he says: "I may say that my visit to the Reservation last week was a very satisfactory one to me, and proved to me that you are taking a lively interest in the welfare of the Indians, and which I am quite sure, in a short time will show good results."[116]

The specifics were:

> Have thirty acres under crop, broken this Spring with one team, out of sod. The crop consists of six acres of wheat, eight of potatoes, seven of oats, and seven of barley, with two acres of turnips and carrots and about two of garden vegetables, which look well for this high climate, we have lots of very cold weather, being over 4200 feet above the level of the sea.
>
> I have at present about eight hundred Indians on the Reservation, to whom I issue rations every morning, namely half a pound of flour and half a pound of beef for each member of the family. The beef cattle are driven up from the Government herd at the Fort, and killed on the reservation.
>
> I have forty Indians at work, for which they receive extra rations. They work well and I have very little trouble with them. They are very kind to me and often make me presents, but at the same time, as is natural with Indians, expect double the value in return.
>
> I intend to have a jollification for them as soon as I get my new house, which I think will be about the 12 inst. I have invited some of my friends up from the Fort and have purchased some articles for prizes, as I intend to have races, shooting, sack races, squaw races and a lot of other amusements, and also give them a big feed, as I promised it to them when I got in my new house.
>
> I expect about 1500 Indians on the 25th inst, as that is about the time the payments are being made, and all Indians this year have to be paid on the Reservations.[117]

According to *Our Pioneers*, English did not move out of the Cypress Hills and to his first home near Maple Creek until 1883.[118]

Dewdney's January 2, 1880, report to Prime Minister Macdonald (who was still Superintendent General of Indian Affairs) seemed to seek confirmation of the government's objectives in sending farm instructors to newly established reserves in the North-West:

---

[116] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 38-40.

[117] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 38-40.

[118] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 38-39; and Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990), 111. If English did not move to Maple Creek until 1883, it raises the question of where he lived if he did take over the Maple Creek Farm from Mr Setter in 1880, as suggested in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 31).

> The idea of taking a few Indians from each reservation and teaching them as you would pupils on a model farm would not be a success.
>
> I presume the wish of the Government is to obtain as great a return of food for the distressed Indians at as cheap a rate as possible, and while raising that on the reservation themselves, give the Indians an opportunity of learning how to make their own living out of the ground.[119]

Dewdney defended teaching Indians to farm as a way to avoid starvation, Indian wars, and crippling expenses for the government.[120] Moreover, he rejected the idea that Indian farms would unfairly interfere with agricultural production by settlers, reasoning that large numbers of settlers had not arrived yet:

> [T]he present policy of raising food ourselves in the interior, and at the same time that we are doing this, teaching our Indians how to make their own living, is the right one; the argument that growing with our own labour produce that could be raised by the settler is unfair to him, falls to the ground at the present time when should settlers not come in so rapidly as to supply the inevitable demand, a general uprising of Indians might follow; and it is surely desirable that when immigration sets in our Indians should be in as independent a position as possible. I am in hopes that in many sections of the North-West our Indians will be able to sell the settlers the seed they must have when first starting.[121]

Evidently Dewdney did not agree with the government's reserve-based approach. In his January 1880 report, he presented arguments in favour of establishing "farming agencies" separate from reserves:

> In considering in what way the farmers would be of most use in carrying out the wishes of the Government, I thought it desirable that they should be located off the Indian reservations ... and where a group of reservations had been settled on within a

---

[119] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 100 (ICC Documents, p. 59).

[120] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 100 (ICC Documents, p. 59).

[121] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 100 (ICC Documents, p. 59).

> small radius a central position should be selected so that they could have the supervision of more than one reserve.[122]

As Dewdney conceived of them, "farming agencies" offered a threefold advantage. First, they would prevent Indians from regarding any crops or improvements produced or carried out on their reserve land in "the first season or so" largely by "our own labour" as their own. Second, they would allow farm instructors more independence. Finally, any surplus produce could be sent to "our central depot for future issue to distressed Indians."[123]

At Qu'Appelle, Indian Affairs' Inspector Thomas Page Wadsworth had already, where possible, located farmers off the reserves in accordance with Dewdney's reasoning in favour of farming agencies.[124] Dewdney was seeking Sir John A. Macdonald's approval of this approach which, if given, would have run contrary to English's activities on the Assiniboine Reserve.

Survey of the Reserve, 1880

As we have seen, in the fall of 1879, surveyor A.P. Patrick received instructions from Commissioner Dewdney "to define the limits of the Assiniboine and Little Child's Reserves, among others."[125] This Patrick did in the spring of 1880 because severe weather prevented him from carrying out Dewdney's instructions before then. In the meantime, on January 20, 1880, Dewdney advised the Surveyor General, Lindsay Russell:

> Mr. Patrick is now at Fort Walsh, and when able to work will complete a reserve for the Assiniboine and one for the Crees after which it will be necessary for him to proceed to Carleton.[126]

On October 1, 1879, approximately six weeks before Dewdney directed Patrick to define the Assiniboine Reserve, the Deputy Superintendent General of Indian Affairs had occasion to advise Sir John A. Macdonald on the general process whereby reserves had been defined. Vankoughnet stated:

---

[122] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 100 (ICC Documents, p. 59).

[123] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 101 (ICC Documents, p. 60).

[124] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 101 (ICC Documents, p. 60).

[125] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Documents, p. 71).

[126] Dewdney to Surveyor General, January 20, 1880, NA, RG 10, vol. 3713, file 20694, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 26).

> The rule followed by the Department has been when the Agent reports a Band to be desirous of having their Reserve set apart for them, which implies that they are prepared to settle down upon the Reserve, and cultivate same, the application of the Agent is referred to the Surveyor General for action.[127]

Alan McDonald was the Swan River–based Indian agent for Treaty 4, but there is no reference to him in documentation outlining the selecting and surveying of the Assiniboine Reserve in the Cypress Hills. His November 2, 1879, report to the Superintendent General of Indian Affairs did not discuss any departmental initiatives in the Cypress Hills.[128]

In 1879 the Indian Branch was still part of the Department of the Interior, as it had been from 1873. On May 7, 1880, it became an independent department, and a Survey Branch was eventually established within the new Department of Indian Affairs.[129] According to the report prepared by Jim Gallo for Canada in this inquiry, the establishment of the Survey Branch "was still in progress in the spring of 1881."[130] Throughout 1880 and 1881, there was some confusion about whether the Deputy Superintendent General should be asking the Deputy Minister of the Interior to instruct surveyors, or whether Commissioner Dewdney was to direct the surveyor at his disposal.[131] Using excerpts from correspondence pertaining to the St Peter's Reserve in Manitoba, Gallo asserts that, by 1883, or "once the Survey Branch had been established," Commissioner Dewdney had to seek the Deputy Superintendent General's approval of surveys.[132] The Surveyor General was unable to correct surveys of Indian reserves, and that created tension between the Department of the Interior and the Department of Indian Affairs.[133] This arrangement prevailed until 1893, when control over Indian reserve surveys was returned to the Surveyor General.[134]

---

[127] Vankoughnet to Sir John A. Macdonald, October 1, 1879, NA, RG 10, vol. 3700, file 17207, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10A and 10B, vol. 1, doc. 11).

[128] A. Macdonald [sic], Indian Agent, Treaty No. 4, to Superintendent General of Indian Affairs, November 2, 1879, Canada, *Annual Report of the Department of the Interior for the Year Ended 30th June 1879* (Ottawa, 1880), 108-9, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 1).

[129] The Department of Indian Affairs was established under the provisions of SC 1880, 43 Vict., c. 28.

[130] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 21).

[131] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, pp. 21-22).

[132] Dewdney to Vankoughnet, May 21, 1883, NA, RG 10, vol. 3713, file 20815, and Assistant Deputy Superintendent General Sinclair to Dewdney, June 1, 1883, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 22).

Just days before the Department of Indian Affairs was officially established in May 1880, and about the time surveyor Patrick was carrying out Dewdney's instructions, Dewdney felt it necessary to seek ministerial clarification of his general authority from Macdonald, who, in addition to being Prime Minister, held the portfolio for the Departments of the Interior and Indian Affairs:

> You know my instructions are of a very general nature, and it is very difficult to determine what authority I possess – you may possibly deem it advisable to make them more definite – I am aware it is difficult to give detailed instructions to govern the duties that I have undertaken scattered as they are over so large a Territory with questions arising which must often be settled on the spot ...[135]

Whether more definite instructions were given can only be inferred from some of the documentation under consideration. With respect to the survey of a reserve for the Assiniboine in the vicinity of Fort Walsh, there is no clear evidence that either Macdonald or the Surveyor General directly objected to it at the time.

In the spring of 1880, "acting in accordance with a telegraphic despatch from [Dewdney] and instructions conveyed to [Patrick] by [Assistant Indian Commissioner] Mr. Galt," Patrick proceeded with the survey of the Assiniboine Reserve.[136] The area he marked off during the summer of 1880, in consultation with the Assiniboine Chiefs, encompassed approximately 340 square miles, including the model farm at the western end of the Cypress Hills and, to the north at a lower elevation, prairie and a lake.[137]

As the end of the year approached, Patrick reported on the seven reserves he had completed, the first being "Assiniboine, north of Cypress Hills," and the others being four in the File Hills and two at Crooked Lake.[138] With regard to the Assiniboine reserve he wrote:

---

[133] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, pp. 32-33).

[134] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 22).

[135] Dewdney to Sir John A. Macdonald, May 2, 1880, NA, RG 10, vol. 3686, file 13364, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 20).

[136] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Documents, p. 71). Galt was appointed Assistant Indian Commissioner by Order in Council 845, June 12, 1879.

[137] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Documents, pp. 70-75).

> I have to report that this Reservation comprises an area of about three hundred and forty square miles. It extends along the North slope of the Cypress Hills the direction of which is East and West, a distance of Eleven miles having a depth of two miles on the summit platform and stretching away for thirty one miles out on the Prairie land below the ridge. The Indian Farm is on the highest point of the range, 4000 feet above sea level and about two miles from the brow of the Hills. On my arrival I met the Chiefs of the Band, who urged upon me their desire that the lines should be so run as to include the whole of the Timbered land.
>
> After much persuasion they consented that the course of the lines should be run as I proposed, North and South and East and West; My object in view being that the lines should, in their direction, accord with the general system adopted in government surveys; and further by this partition, a fair division of the Timbered Lands would be made. I carried out my survey accordingly and on my leaving them the Chiefs expressed themselves well satisfied with the result.
>
> The initial point is situated about one mile to the south of the Government farm at the head of the Mountain, and twenty-one miles West of Fort Walsh. The land in this vicinity is well timbered, and the Indians appear to be thoroughly aware of the value of the timber – which consists of Douglas Pine, a species of first class pitch pine, averaging in size from 12 to 14 inches in diameter and having a height from 40 to 50 feet clear of branches. The soil, a heavy black loam, is of itself well adapted for farming purposes. As a consequence of the excessive altitude – severe summer frosts exercise a detrimental influence upon farming operations.
>
> For my initial point I ran North a distance of thirty-one miles.
>
> For the first three miles, my line runs through a well timbered section of the Hills. In the course of the next five miles, which comprise an area of gently undulating hills, it crosses a Lake of about two miles and a half in extent, known as Fish Lake, adjacent to which a large number of Indians had been located for the winter, living upon the fish which are there abundant, principally Pike. The pasturage in this distance is very luxuriant, and the soil rich. From this point I descended to the Plain proper and for the remaining twenty-three miles the soil was barren and utterly useless for agricultural purposes.
>
> I then returned to the initial point and ran East upon a chord of eleven miles.
>
> For this distance the soil is good and similar to that before described at the Head of the Mountain. To the North of this line there are a number of "coulees" slightly timbered. These "coulees" form the heads of Creeks, these run North and join a water system which ultimately empties into the South Saskatchewan at the South East corner of this Reserve, there are two "coulees". Extending first to the East, where my East line crosses them, about a mile before their junction; and then trending to the South; from these "coulees" the Battle River rises; running south it passes Fort Walsh, and

---

[138] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Documents, pp. 70-71).

> then into the Milk River, a tributary of the Missouri. From the South East corner of the Reserve the line runs North to the Lake of "Many Islands" a distance of thirty-two miles.
>
> For the first five miles the Pasturage and soil are good the "coulees" are sparsely timbered. On the rest of the distance to the Lake the soil is poor and alkaline. In order to meet the earnest wish of the Indians within justifiable limits (the soil being worthless) I slightly extended the line to the shores of the Lake valuable to them on account of the water fowl which are there plentiful.
>
> I then proceeded to the North West angle of the Reserve previously located by me and commenced to run a line representing the northern boundary. From this point I ran the line due east for a distance of three miles; thence north to the "Lake of Many Islands" making this Lake a part of the northern limit of the Reserve. Here the soil is barren and alkaline, I devoted much attention to gaining a topographical knowledge of the interior of this Reserve, the result of which will appear on my Plan.[139]

No plan has been located but, from the foregoing description, one can easily tell that, within the boundaries of this area, the landscape ranged from lush hills to a treeless prairie to lake land.

The area included timber, fish, fowl, rich pasture, and rich soil as well as barren plains, alkaline soil, and sparsely timbered coulees. The Chiefs, though not named, gave Patrick specific directions based on their long-term interests. In his report for this inquiry, Jayme Benson calculated that a reserve of 340 square miles "would have been sufficient for about 1750 people, which would have made sense given that English had stated that 1500 people were expected."[140]

How much Dewdney or Galt communicated with Patrick at Fort Walsh during 1880 is not clear.[141] Both visiting and communicating were difficult in 1880, as people and mail alike had to make their way to Fort Walsh through Montana. No post offices existed from the western boundary of Manitoba to the Rocky Mountains.[142] United States postage was used, and the mail was delivered by contract with the North-West Mounted Police on a fortnightly basis.[143]

By June 1881, when Patrick's plans, mailed from Montana, were received in Ottawa by Deputy Superintendent General Vankoughnet, Patrick was no longer employed by the department.[144] Nevertheless, Vankoughnet forwarded the plans to Dewdney for approval:

---

[139] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, NA, RG 10, vol. 3730, file 26219 (ICC Documents, pp. 70-75).

[140] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 12).

[141] *Canadian Almanac* (Toronto: Copp Clark, 1880), 53.

[142] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 139.

[143] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 139.

> I have now to inform you that on the 15th and 17th inst. respectively three plans of (1) Little Black Bear, Star Blanket, Okanee and Pe-pe-kis-sis Reserves at File Hills (2) Osoup's Reserve on the Qu'Appelle River and (3) the Assiniboine Reserve, Treaty 4, were received at this Department without any covering letter. They were apparently mailed at Fort Assiniboine, Montana Territory U.S. about the 8th instant.
>
> I now send these documents to you inasmuch as they require to be examined and certified by Mr. Dewdney before they can be accepted by the Department as correct.[145]

Dewdney received Patrick's plans on July 4, 1881.[146] It is not known what became of them. Only two of the seven reserves described in Patrick's December 16, 1880, report were finally approved and confirmed, these being the Okanese and Starblanket reserves.[147]

Recognition of the existence of the Assiniboine "reserve" appears to have been given by the NWMP, at any rate. In late 1880, Lieutenant-Colonel Irvine, who had succeeded Macleod as lieutenant-in-charge at Fort Walsh,[148] reported that annuity payments had been made by Agent McDonald that fall to "the Assiniboine Indians at the Indian reservation at the head of the Cypress Hills."[149] Also in late 1880, Inspector Crozier, NWMP, noted "a considerable number of fish ... caught by the Indians in the lake at the head of the mountain, where the Assiniboine Reservation now is."[150] There is also evidence that medical help was sent to the area in the fall of 1880.[151] Patrick's report describing his survey of the Assiniboine Reserve in the Cypress Hills was published in the department's Annual Report for 1880.[152] Elsewhere in that Annual Report, a year-end chart entitled "Farming Agencies and Indian Reservations" shows John J. English as the instructor for the "Saulteaux" and "Assiniboine" at a location named simply "Cypress Hills."[153] No Indians are shown "on Reserve."[154] Although he was primary Indian agent for Treaty 4, Alan McDonald made almost no remarks about the Cypress Hills or the Assiniboine in the department's annual reports for 1880 or 1881.

---

[144] Dewdney to Vankoughnet, February 5, 1881, NA, RG 10, vol. 3733, file 26733, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 25).

[145] Vankoughnet to Galt, June 23, 1881, NA, RG 10, vol. 3751, file 29992, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 27).

[146] Galt to SGIA, July 4, 1881, NA, RG 10, vol. 3573, file 154, pt 1, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 27), and Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 26).

[147] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 27).

[148] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 149, 159, 194.

[149] Report of Irvine, December 29, 1880, in Canada, "Annual Report of the Commissioner of the NWMP, 1880," in Parliament, *Sessional Papers*, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt 1, p. 9).

[150] Report of Crozier, December 1880, in Canada, "Annual Report of the Commissioner of the NWMP, 1880," in Parliament, *Sessional Papers*, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 15).

[151] Report of Kennedy, December 30, 1880, in Canada, "Annual Report of the Commissioner of the NWMP, 1880," in Parliament, *Sessional Papers*, in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 15).

DEWDNEY'S RELOCATION PROPOSAL, NOVEMBER 1880

Barely a year after English had been assigned to the farm on the Assiniboine reserve and only a month after Edwin Allen had been appointed Indian agent at Fort Walsh, Dewdney recommended relocating the Assiniboine out of the Cypress Hills.[155] This recommendation was made in November 1880, a month *before* Patrick gave his year-end report to Dewdney on the survey of the Assiniboine reserve.

In the summer of 1880, John Macoun, a professor of botany and geology, had explored the Cypress Hills and had somehow compared English's farm at the Head of the Mountain with that of Setter at Maple Creek. Although Macoun found the soil at the Head of the Mountain "far superior" to that at Maple Creek, he pronounced that farming in the Cypress Hills would "always be a failure" owing to the climate.[156] This sentiment was echoed in Agent Edwin Allen's first report to Macdonald on September 30, 1880:

> I next visited the Assiniboine Reservation at the Head of Cypress Mountain. The reserve is situated in an excellent locality, for wood and water, but the climate is such that it is useless to think of continuing agriculture in that locality owing to the early frosts and snow storms which are so prevalent ... It is very much regretted the crops

---

[152] Allan Pointz Patrick to [Indian Commissioner], December 16, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 113-17, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 2).

[153] Chart, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 95, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 2).

[154] Chart, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 95, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 2).

[155] Edgar Dewdney, Commissioner of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, November 19, 1880, NA, RG 10, vol. 3726, file 24800 (ICC Documents, pp. 83-85).

[156] Extract from a Report of Exploration by Professor John Macoun in Canada, Parliament, *Sessional Papers*, 1881, No. 3, 16-17, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, pp. 28-29).

> were not a success as the Assinniboines took every interest in the advancement of their agricultural pursuits, and displayed great willingness to do any work they were called upon to perform. I trust they will meet with better success next year, as their conduct during the past season has been most commendable and really merits better success than has attended to them this year. Although their crops were a failure they appear in no way discouraged, on the contrary, they speak of looking for a better location for their reserve next year.[157]

Allen had become the additional Indian agent in the Treaty 4 area on September 13, 1880.[158] In the position barely a year, he managed the western part of the Treaty 4 territory from Fort Walsh, where he had the company of T.P. Wadsworth, Inspector of Indian Farms and Agencies and one of the NWMP personnel.[159]

Wadsworth had been appointed in July 1879. Being a "close associate of Vankoughnet," he often communicated directly with Indian Affairs headquarters in Ottawa.[160] According to Wadsworth, he had been sent to Fort Walsh in 1881 "with instructions – first to ascertain what facilities that section of the country offered for the settlement of Indians, and next to induce them to go North and settle upon Reserves there."[161]

At least in a limited way, Dewdney anticipated the material considerations of vacating the Assiniboine Reserve. His concern was that nothing of value be left behind:

> It is of utmost importance that we should know as early as possible whether the change is to be made, as I have instructed Mr. Agent McDonald to look for a reserve to get some ground broken in the spring --- a year. In the event of this arrangement being carried out, the reserve at the head of the Cypress Mountains will have to be abandoned, and everything that can be made use of must be transferred to the new reserve.[162]

---

[157] Allen to Superintendent General of Indian Affairs, September 30, 1880, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31^{st} December 1880* (Ottawa, 1881), 106, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 2).

[158] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31 December 1880* (Ottawa, 1881), 105, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 32).

[159] *Canadian Almanac* (Toronto: Copp Clark, 1881), 46.

[160] D. Aidan McQuillan, "Creation of Indian Reserves on the Canadian Prairies, 1870-1885," *Geographical Review* 70, no. 4 (October 1980): 395, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 32).

[161] Wadsworth to Dewdney, August 17, 1884, NA, RG 10, vol. 7779, file 27140, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 36).

[162] Dewdney to Wadsworth, February 21, 1881, NA, RG 10, vol. 3726, file 24763, cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p. 3).

Dewdney gave this instruction to Inspector Wadsworth on February 21, 1881; he still had not received Patrick's plan of survey. There is no evidence that compensating the Assiniboine Band for improvements at the Assiniboine Reserve or for the loss of this land surveyed for them was being contemplated, nor was any discussion of surrender documented.

Dewdney suggested to Macdonald on November 13, 1880, that costs associated with anticipated crop failures at the "Assiniboine Reserve" were a reason to move the Assiniboine to the lower elevation of Maple Creek:

> I have the honor to inform you that the result of the Farm on the Assiniboine Reserve in the neighbourhood of Fort Walsh has not been as satisfactory as we had hoped.
>
> The grain was all frozen and had to be cut for hay, the Potatoes were all infused by the frost but the yield was considerable, fearing however that they had not ripened sufficiently to keep over the winter, I directed they should be fed, thus saving our flour.
>
> I am not at all sure whether in most seasons both Potatoes and Barley could not be raised there, but as a failure of a crop on a Reserve where so many Indians would eventually reside and depend on for food would be a very serious matter, I thought it better to advise a change of location for the Assiniboine Indians.
>
> I have induced the Crees who were settling on Maple Creek (Mr. Setter's Agency) to go north to their own Country where Reserves have been allotted some time ago and where portions of those bands are now settled and I think it will be advisable to transfer the Assiniboine to that locality. They are very good Indians and willing to do as we advise – they have worked well this summer, and Mr. English told me that at no times did he call on them for assistance without getting all the hands he required.
>
> Mr. Setter was more successful than any of our Farmers, his crops not having suffered from frost, a sample of his wheat I have which is first class and he ripened cucumbers and other vegetables which convinces me that the location would be a good one for the Assiniboine.
>
> I may state that I instructed Mr. Setter to return with the Indians that promised to go North. I expect they are already in the Qu'Appelle District.[163]

Dewdney had confidence in the Assiniboine's potential to be good farmers. He was also very aware of their hunting activities and their attachment to the Cypress Hills. At the end of 1880, he wrote:

> The country south is entirely destitute of game ... consequently our Blackfeet and Assiniboine will be utterly without ... resources. I am in hopes to be able to induce

---

[163] Edgar Dewdney, Commissioner of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, November 19, 1880, NA, RG 10, vol. 3726, file 24800 (ICC Documents, pp. 83-85).

> those Crees who, up to this time, have been attempting to make their living by the buffalo to go north; but it cannot be expected that either the Blackfeet or the Assiniboine can be induced to leave their own country. These, hitherto supposed to be averse to agriculture, have all shown such a disposition to work, that I believe in a few years they will be independent of the Government, if properly assisted and instructed in agriculture.[164]

The department's farm at Maple Creek, first associated with Setter and then with English, in 1881–82 became part of the story of the Assiniboine Band's removal from the Cypress Hills. The present town of Maple Creek, Saskatchewan, did not take shape until after the railroad reached the area in 1882.

Dewdney knew some Blackfoot and Assiniboine were attempting to pursue buffalo and small game south of the border. Doing so was dangerous owing to border patrols, hostile tribes, horse stealing, and whiskey traders.[165] Canada wanted to avoid any untoward incidents with the Americans; moreover, any violence on the frontier was contrary to Canada's plan for the opening the North-West to agricultural settlers.

On the border crossing situation, Macdonald wrote in his 1882 annual report as Minister of the Interior that "[a]part from considerations of an economical nature, the presence of these Indians in the vicinity of Fort Walsh is objectionable from an international point of view." Consequently, a pass system was proposed to curtail the movement of Indians across the border.[166]

Three weeks before Dewdney wrote to Macdonald proposing a relocation of the Assiniboine Band, the Macdonald government signed, on October 21, 1880, the controversial and costly contract for constructing the Canadian Pacific Railway.[167] Regardless of whether farming or ranching would have provided a feasible livelihood for the Assiniboine Band in the Cypress Hills, larger political and economic factors were at work.

---

[164] Edgar Dewdney, Commissioner of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 4, 94 (ICC Documents, p. 82).

[165] Edgar Dewdney, Commissioner of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, December 31, 1880, Canada, Parliament, *Sessional Papers*, 1880-81, No. 4, 93-94 (ICC Documents, pp. 81-82).

[166] Canada, *Report of the Department of Indian Affairs for the Year Ended 31st December 1882* (Ottawa, 1883), x, xi, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 40).

[167] "Railway History," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 1822.

INDIAN INFLUX TO FORT WALSH, SPRING AND SUMMER 1881

During the winter of 1880–81, Assiniboine at the Cypress Hills had to eat their horses to survive.[168] Indians in the vicinity of Fort Walsh were generally unable to subsist by hunting, farming, or selling their labour. On May 4, 1881, Agent Allen reported large numbers of destitute Indians arriving at the fort from the direction of the Missouri. He feared they would become unmanageable unless they could be "divided into small parties." Furthermore, Indians from Battleford were bound for Fort Walsh, as well as those Indians starving at Qu'Appelle.[169]

Assistant Commissioner Galt's response to this news was to advise Allen "to endeavour to persuade" any Indians looking for relief to go to their respective reservations and "to inform them that the government will only afford them assistance while they are working on their Reserves." If necessary to get them on their way, Allen was authorized to send provisions with them for part of the way.[170]

Given the concerns of NWMP officials regarding the crisis, Galt immediately wrote to Macdonald.[171] Galt anticipated that the destitute Indians inundating Fort Walsh would wish to remain to "take up their Reserves in that neighborhood," a situation he opposed because the land in the "neighborhood" was "poor and generally unsuited for farming purposes." In his view, "it would just be wasting money to go to the expense of having Reserves surveyed for them, as in the end they must locate elsewhere."[172]

Galt wrote to the Superintendent General again on May 24, 1881, about the need "to prevent a large gathering of Indians at Fort Walsh." He wondered if he would be directed to "cut down the rations" if the Indians refused to go to their reserves.[173] He advocated supplying bacon over beef as a way "to arrive at the cheapest method of feeding Indians."[174] Undermining Indians' ability to earn wages was another strategy Galt thought would help to force Indians to their reserves:

---

[168] Dan Kennedy, *Recollections of an Assiniboine Chief* (Toronto: McClelland and Stewart, 1972), 66, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 39).

[169] Agent Edwin Allen, Fort Walsh, to Commissioner Edgar Dewdney, Winnipeg, May 4, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 158-60).

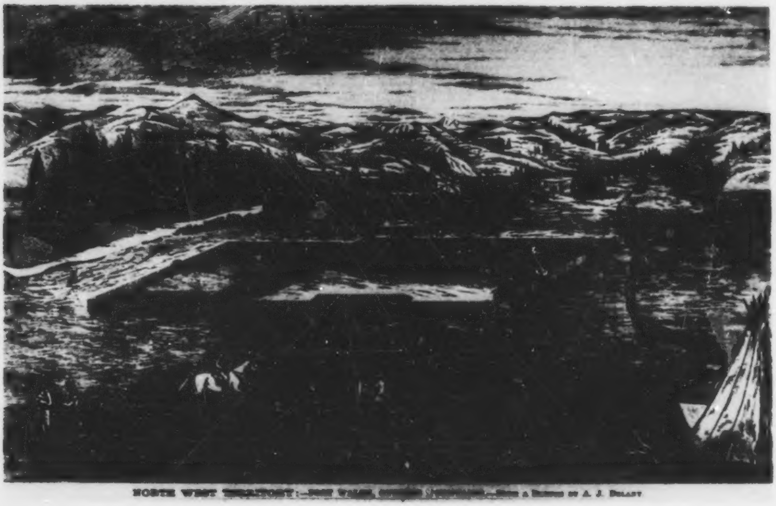
[170] Assistant Commissioner Galt, Winnipeg, to Agent Allen, Fort Walsh, May 20, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 161-62).

[171] Col. Irvine, NWMP, to White, April 25, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 165-66).

[172] Assistant Commissioner Galt to Superintendent of Indian Affairs, May 20, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 163-64).

[173] Assistant Commissioner Galt to Superintendent of Indian Affairs, May 24, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 168-72).

[174] Assistant Commissioner Galt to Superintendent of Indian Affairs, May 25, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 173-77).


NORTH WEST TERRITORY:—FORT WALSH, [illegible]—FROM A SKETCH BY A. J. DELANY

Fort Walsh 1, from sketch by A.J. Delany [1875]

Provincial Archives of Manitoba N13677

> No Government rations should be issued to Indians who are receiving pay from settlers for doing outside work. I think it would be well to encourage the Indians to work on their Reservations rather than seek employment from settlers until at all events they have built houses for their families and got their fields into a thorough state of cultivation.[175]

However, not all the views of the Commissioner's office were well received by government men working in the field. When Agent Allen tried to put "non-working" Indians on half rations, he was overruled at Fort Walsh by Colonel Irvine and the NWMP's Inspector Wadsworth on the grounds it was unwise.[176] At Fort Macleod, Indian Agent Norman Thomas McLeod similarly refused to issue half rations so as to prevent "serious" consequences to the public. He challenged Dewdney to fire him over the matter: "if you considered my action as a disobedience of orders, I must beg to be relieved of my duties here."[177]

---

[175] Galt to McLeod, May 26, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 178-79).

[176] Agent Allen to Galt, June 27, 1881, NA, RG 10, vol. 4325 (ICC Documents, pp. 99-101).

[177] Agent McLeod to Dewdney, June 24, 1881, NA, RG 10, vol. 344, file 29506-1 (ICC Documents, pp. 102-03). McLeod continued at Fort Macleod probably until 1883 (*Canadian Almanac* [Toronto: Copp Clark, 1881-83]).

Although the government sought to avoid paying annuities at Fort Walsh in 1881, to prevent confusion and losses that might result from paying individuals in more than one location, the Indians who had congregated there "refused to comply with the wishes of the Department" that they "return to their respective districts" and be paid "within the agencies to which they belonged."[178] The officers of the department abandoned their stance on paying only at reserves when enough buffalo appeared in the Fort Walsh area to provide "a pretext" for informing the Indians that "they would be paid on this occasion at Fort Walsh, in order that they might follow the buffalo at once without incurring the loss of time which their proceeding to their reserves for their annuities would involve."[179] This "fortuitous circumstance" enabled the government to avoid "a complication which might have resulted seriously, owing to the small number of mounted policemen at Fort Walsh."[180] Later in 1881, Colonel Irvine succeeded in convincing the government of the need to increase the strength of the NWMP from 300 to 500 men distributed over 13 posts in the North-West.[181]

Maple Creek, Little Child, and the Assiniboine Band, 1881

When farm instructor Setter was transferred from Maple Creek (east of the Cypress Hills) to the Crooked Lake Agency in 1880, English replaced him at Maple Creek.[182] From this information, Jim Gallo concludes that the Head of the Mountain farm was closed at that time.[183] No other information, however, has been found to confirm this assumption.

Included in the 1881 *Annual Report* is a letter from Agent Allen or Inspector Wadsworth to Dewdney about a May 1881 visit to Maple Creek

---

[178] Superintendent General of Indian Affairs to Governor General, December 31, 1881, Canada, Parliament, *Sessional Papers*, 1882, No. 6, vii-viii (ICC Documents, pp. 86-87).

[179] Superintendent General of Indian Affairs to Governor General, December 31, 1881, Canada, Parliament, *Sessional Papers*, 1882, No. 6, vii-viii (ICC Documents, pp. 86-87).

[180] Superintendent General of Indian Affairs to Governor General, December 31, 1881, Canada, Parliament, *Sessional Papers*, 1882, No. 6, vii-viii (ICC Documents, pp. 86-87).

[181] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 168.

[182] "Farming Agencies and Indian Reservations, Treaties 4, 6, and 7, North-West Territories" in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880* (Ottawa, 1882), 95, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 31).

[183] "Farming Agencies and Indian Reservations, Treaties 4, 6, and 7, North-West Territories," in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880* (Ottawa, 1882), 95, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 31).

Farm.[184] There, Little Child had "asked [the author] to give him a deed of the reserve, saying he was alarmed that it would be taken from him and handed over to some other Indians."[185] The author responded that he could not give him the deed, but said the land would not be handed over to anyone else provided Little Child "worked the place properly."[186] Little Child's response was to try to return his flag and medal with the statement: "[H]e had made his living before we came in the country and could do so again."[187] The writer of this May 14, 1881, letter reports that he told Little Child to give the flag and medal to English if he wanted and that he [the writer] "would see about appointing a new chief, and one who would make his men work."[188] The table in the report headed "Number of Indians in the North-West Territories and their whereabouts on the 31st December, 1881" has columns for "Name of Band," "Location of Reserve," "Tribe," "No. on Reserve," "No. being absent," "Total No. of Indians," and "Whereabouts of Absentees." On this table, all 297 of Little Child's Band are shown to be absent and hunting in the Fort Walsh District. The columns for "Location of Reserve" and "Tribe" opposite Little Child's name are empty.[189] All the members of the bands of Man Who Took the Coat (278), Long Lodge (123), Poor Man (137), Chic-ne-na-bais (286), and Duck Head Necklace (13), plus 74 "Stragglers," are also shown as absent and "Hunting buffalo, Fort Walsh District."[190] Unlike Little Child's Band, under "Tribe," the column for

---

[184] [author and recipient unknown], May 14, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), xxxi-xxxii, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[185] [author and recipient unknown], May 14, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), xxxi-xxxii, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[186] [author and recipient unknown], May 14, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), xxxi-xxxii, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[187] [author and recipient unknown], May 14, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), xxxi-xxxii, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[188] [author and recipient unknown], May 14, 1881, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), xxxi-xxxii, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[189] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 56, 58, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[190] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 56, 58, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

Assiniboine is filled in, and the "Location of the Reserve" is shown as "Maple Creek" for all the other bands.[191] Elsewhere in this 1881 *Annual Report*, a chart for "Farming Agencies and Indian Reservations" shows "J.J. English (Assiniboine Indians)" under the heading "Instructor," and "Maple Creek" is given as the "Location."[192] Five men were employed at Maple Creek, including the instructor.[193] Setter was shown to be at Crooked Lake.[194]

A local history of southwestern Saskatchewan, *Our Pioneers*, confirms English's involvement with Maple Creek Farm.[195] Unfortunately, it does not date the farm's establishment; however, it clearly locates Maple Creek Indian Farm near the present town of Maple Creek, Saskatchewan:

> The Department of Interior started an Indian Farm on Maple Creek a few miles south of the town [Maple Creek], the first instructor being J.J. English, who came west from Omemee, Ontario. A substantial log house was erected on the farm together with suitable out-buildings. When the Indians were moved to Qu'Appelle in 1882-83, the farm was no longer necessary for Indian purposes and it passed into the hands of Major Shircliffe, an ex-Mounted Police officer.[196]

Ninety acres of land at Maple Creek Farm were broken and 22 of them planted, mainly with wheat, oats, and potatoes in May 1881. Without naming the band or bands involved, Dewdney wrote: "Some of the Indians have ploughed and worked remarkably well, which only tends to prove that those who wish can learn as readily as the whites.[197] In June 1881, Dewdney stated that the "Indians appear to have displayed considerable pride in making gardens for themselves."[198] But, in Dewdney's mind, the Indians that he associated with Maple Creek were not yet at their reserves:

---

[191] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 56, 58, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[192] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 48-49, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[193] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 48-49, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[194] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 48-49, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[195] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 3.

[196] Gwen Pollock and Elsie Hammond Thomas, *Our Pioneers* (Prime: South Western Saskatchewan Oldtimers' Association, 1994), 3.

[197] Dewdney to recipient unknown, May 14, 1881, Canada, Parliament, *Sessional Papers* 1882, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881," xxxi (ICC Documents, p. 89).

> After Mr. Wadsworth arrives, should any of the Indians who are here desire and make up their minds to settle on reserves this fall, I will, with your permission, get large farms broken up this year so that next spring the land will be in proper condition to work and raise whatever is planted.[199]

First Attempt to Settle the Assiniboine Band at Maple Creek, June 1881

The spring of 1881 saw a setback to the government's plans to encourage more Treaty 4 Indians to settle around Qu'Appelle. Dewdney had held a council at Qu'Appelle with Indians he considered "so contented" that he encouraged one chief from Crooked Lake reserve to go to Fort Walsh and "advise his young men to come home."[200] This plan backfired:

> [O]n arriving at Fort Walsh he acted in a manner diametrically opposite to that which he had voluntarily promised to observe, and it was reported to me that he had told the Indians that the Government was starving them and that some of his relatives had died last winter from the effects of starvation.[201]

This impression was difficult for the government to counteract; moreover, the Cypress Hills Indians were not well disposed to settling in the vicinity of Maple Creek Farm.

In June 1881, Inspector Wadsworth set out from Fort Walsh to identify other lands for reserve purposes.[202] He began by going east of the Cypress Hills to Maple Creek Farm, taking with him Piapot, "the principal Chief here of the Cypress Mountain Crees," and some of his head men.[203] The Assiniboine were not ready to cooperate with Wadsworth:

---

[198] Dewdney to recipient unknown, June 8, 1881, Canada, Parliament, *Sessional Papers*, 1882, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881," xxxii (ICC Documents, p. 90).

[199] Dewdney to recipient unknown, June 8, 1881, Canada, Parliament, *Sessional Papers*, 1882, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881," xxxii (ICC Documents, p. 90).

[200] Dewdney to Superintendent General, January 1, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 37-38, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[201] Dewdney to Superintendent General, January 1, 1882, Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881* (Ottawa, 1882), 37-38, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," January 1998 (ICC Exhibit 10A and 10B, Annual Reports, Acts, Sessional Papers, vol. 1, doc. 9).

[202] Wadsworth to Dewdney, July 3, 1881, NA, RG 10, vol. 3744, file 29506-1(ICC Documents, pp. 104-10).

> I had a council meeting with the Assiniboine and requested the four chiefs to accompany me and see the country and show me where they wished to take a Reservation. They declined to do this without giving reasons, nor could I change their resolutions.[204]

On this occasion, Piapot did the required tour with Wadsworth and picked a spot for his reservation about 10 miles north of Maple Creek:

> Upon my return I again held a meeting with the Assiniboine and told them I could not consent to their taking a reservation in this part of the country, and that I was prepared to send them to a good one at either little Touchwood Hills, Qu'Appelle or Crooked Lake.
>
> "The Man Who Took the Coat" speaking for them, "said they wished to go to" (Describing the country where Piapot had chosen) and which is not sufficient in extent for them too, particularly as the Crees and Assiniboine are not good enough friends to be such near neighbours.
>
> I then reminded the Chief that he had stated last winter to Mr. English (vide Mr. English's letter) that he was willing to go anywhere north he was desired to go. He replied, he never said so. ... but there is no doubt in my mind English had not interpreted these Indians correctly whether willfully or not I will not state.
>
> Piapot got up and said that the reservation he had selected was no new place to him, that he and "Little Pine" had picked it out long ago, and that it was marked by a pile of stones (I did not see them) and that he claimed it.
>
> Here was a dilemma: These large bands of Indians choosing the same ground. Had it not been for this claim of Piapot on behalf of himself and "Little Pine" I would have telegraphed you for permission to settle the Assiniboines here: as it now stands I don't think it would be right to do.[205]

Agent Allen's July 5, 1881, account of the tour confirms Wadsworth's report, but it also expresses Allen's discomfort at being connected to English through the Assiniboine.[206] Allen distrusted English and was suspicious of the Assiniboine's motives:

> It was quite apparent that some secret influence had been at work to induce these Indians [Assiniboine] to ask for that particular location [Piapot's]. I am inclined to

---

[203] Wadsworth to Dewdney, July 3, 1881, NA, RG 10, vol. 3744, file 29506-1(ICC Documents, pp. 104-10).
[204] Wadsworth to Dewdney, July 3, 1881, NA, RG 10, vol. 3744, file 29506-1(ICC Documents, pp. 104-10).
[205] Wadsworth to Dewdney, July 3, 1881, NA, RG 10, vol. 3744, file 29506-1(ICC Documents, pp. 104-10).
[206] Allen to Dewdney, July 5, 1881, NA, RG 10, vol. 3757, file 31397 (ICC Documents, pp. 91-96).

> believe from what I have seen and heard that the Assiniboine would have gone north to take up a reservation had not a secret power been in their midst advising them contrarily ...
>
> The crops at the [Maple Creek] farm looked extremely well and only a small portion remained to be fenced. I expect we will have a very large return of wheat and oats and should other reservations be taken up by Indians in this Mountain we will have sufficient to seed very large farms from what will be raised this year at Maple Creek. If it is the intention of the Government to locate any more Indians in this district, I trust same will be accomplished this year so that we will be able to break up large tracts of land on each reservation and have the ground in good condition for spring crops ...
>
> Mr. Wadsworth informed me that Mr. English had reported to you [Dewdney] during the winter that the Assiniboine wished to go to Touchwood Hills. I was aware you had heard a rumour to that effect from the tenor of one of your letters wherein you stated that such [illegible] that he never stated such a thing. Mr. Wadsworth asked him at Maple Creek if he had expressed a desire to go to Touchwood Hills and he replied that he had not, that this was his home and country, and he wished to remain here. I cannot understand the motive that prompted Mr. English to report this to you without sending it through me ... Had the Assiniboine expressed a desire to me or had Mr. English informed me of their wish (which he should have been obliged to do) to go to Touchwood Hills so that I would have known their feeling, I would have asked in conjunction with same. It is very difficult to manage Indians at any time but now particularly when those working directly with them, as a farming Instructor is, and who does not work in perfect accord with the Agent I might state that Mr. English having been Farming Instructor previous to my appointment, and having full management of this reservation feels the restraint of official interference and even went so far as to say, when my appointment was made known here, last summer, that it didn't make any difference to him, that he was employed by the Government, and the Agent would have nothing to do with him. I have informed you of this matter to let your mind into the innate feelings of Mr. English from time to time are giving vent to themselves.[207]

How, or if, the Assiniboine came to consider the Touchwood Hills is unclear. In this letter, Allen states that English had what amounted to "full management of this reservation."[208] Whether Allen was referring to Maple Creek or the Assiniboine reserve in the Cypress Hills is not entirely clear.

In any case, the only result of Allen's complaint against English seemed to be that Sir Cecil E. Denny, and not Allen, served as the Indian agent at Fort Walsh from the fall of 1881.[209] The English-born Denny arrived in Canada in 1874 via the United States to obtain a commission as captain in the new

---

207 Allen to Dewdney, July 5, 1881, NA, RG 10, vol. 3757, file 31397 (ICC Documents, pp. 91-96).
208 Allen to Dewdney, July 5, 1881, NA, RG 10, vol. 3757, file 31397 (ICC Documents, pp. 91-96).
209 Denny to Dewdney, November 1, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 138-42).

NWMP. He left for Fort Walsh from Calgary or Fort Macleod in the fall of 1881. In 1882, he resigned from the NWMP to carry out his duties as Indian agent.[210]

In Denny's autobiography, *The Law Marches West*, he recalls driving "with Lieutenant-Governor Dewdney from Macleod to Fort Walsh to take charge as Indian Agent of the Crees and Assiniboine at that place." The events that followed were summed up by Denny: "I succeeded after tedious negotiations in persuading them to their different reservations, the Crees to the north and the Assiniboine to the east."[211] Early in 1882, Denny was back west in the Treaty 7 area as the Indian agent based at Fort Macleod.

Directions from Ottawa, July 1881

Inspector Wadsworth received clarification regarding the government's policies with respect to rations and settling Indians from Assistant Commissioner Galt on July 13, 1881:

> It is the policy of the Government to keep the Indians on their Reservations as much as possible and to that end to feed there only – and if they choose to roam about the Country they must not be permitted to think that they can go to any Post and receive a similar Ration to those Indians who belong there.
>
> ... Before you leave Walsh, establish a fixed Ration for those who are settled in their Reservations and also a meager ration for those who don't belong to the District and who won't go Home.
>
> ... You must use your discretion in these matters keeping down the expenditure as much as possible while at the same time making sure that peace and order will be preserved. You are on the spot, and in a position to judge how far we can go in endeavouring to insist upon these Northern Indians going Home without causing trouble.[212]

Evidently, Galt at that time still recognized that certain Indians had a right to settle in the Cypress Hills, but feared many others might choose to remain there too.

Headquarters was quick to blur the distinction between Indians who belonged in the Cypress Hills by virtue of having selected a reserve there and those Indians considered to be from the north. On July 16, 1881, Galt wired Deputy Superintendent Vankoughnet to ask: "Can I settle Cypress Mountain Crees and Assiniboine in this locality if I fail to get them to move north ...?" The reply from Vankoughnet on the same day was: "Wadsworth must remain at Walsh should do utmost persuade Cypress Indians take Reserves north before settling them near Walsh."[213]

---

[210] A.C. Rutherford in Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron (Toronto: J.M. Dent and Sons, 1939), vii-x. In 1885 Denny took up ranching near Fort Macleod. He subsequently aided the government in various capacities, finally serving as archivist for the province of Alberta until his retirement in 1927 (pp. 156 and 170).

[211] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 170.

[212] Galt to Wadsworth, July 13, 1881, NA, RG 10, vol. 3744, file 1069 (ICC Documents, pp. 97-98).

Galt therefore directed Wadsworth two days later to pressure all the Indians to leave the Cypress Hills. To advise Macdonald of this plan, Galt wrote from Winnipeg:

> In reference to the question of giving certain of the Indians their Reservations about Cypress Hills, I beg to say that *in accordance with your instructions* by telegraph I have wired Mr. Wadsworth that he must *use every endeavour to persuade the Indians to take their Reserves North before settling then near Walsh* but I fear the Indians will become obdurate and insist upon remaining where they now are. They have a sort of lingering hope that some day or other the Buffalo will return to our country and that in consequence the Fort Walsh District is the most convenient area to settle in.[214]

From this letter, it appears as though the general instruction to clear the Cypress Hills of Indians originated with the Prime Minister.[215]

Of course, Dewdney had already written Macdonald on November 13, 1880, about relocating the Assiniboine Band from the Assiniboine Reserve to Maple Creek. The more general instructions, which Assistant Commissioner Galt passed on to Inspector Wadsworth and to Agent Allen, paid little heed to a reserve having been selected under Treaty 4 and surveyed in the Cypress Hills for the Assiniboine Band.

CLOSING FORT WALSH, AUGUST 1881

Four or five thousand Cree and Assiniboine assembled in the vicinity of Fort Walsh during the summer of 1881.[216] By mid-summer, Inspector Wadsworth and Colonel Irvine were already urging the Indian Department and the NWMP to abandon Fort Walsh. This action, they thought, would accomplish the department's objective of making the Indians go north and save it money.[217] Faced with the challenge of paying treaty money at Fort Walsh and knowing the government's few men were in danger of losing a possible power struggle there, Wadsworth pointed out the obvious to Galt on August 8, 1881: "[I]f this Post & Agency are to be continued, the former must be strengthened or no Indian Agent can manage or carry out orders regarding the Indians."[218]

---

[213] Wadsworth to Dewdney, July 5, 1881, NA, RG 10, vol. 3744, file 29506-1, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 36).

[214] Galt to Superintendent General of Indian Affairs, July 18, 1881, NA, RG 10, vol. 3744, file 29506-1(ICC Documents, pp. 111-13). Emphasis added.

[215] John A. Macdonald was Superintendent General of Indian Affairs from 1878 to 1883 and in 1887. Edgar Dewdney succeeded him, holding the position until 1892. Lawrence Vankoughnet was the Deputy Superintendent General of Indian Affairs from 1874 to 1893. Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal & Kingston: McGill-Queen's University Press, 1990), app. 1.

[216] Canada, Parliament, *Sessional Papers*, 1882, No. 6, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1881" (ICC Documents, pp. 86-90).

Ten days later, Wadsworth wrote Deputy Superintendent Vankoughnet about closing Fort Walsh:

> I still adhere to my opinion that the only peaceable way to get them North is to abandon this place. Should the buffalo remain in the country I suggest a postponement of this course, for in that case the whiskey traders have to be looked after: when the Indians have nothing to trade there is no liquor traffic.[219]

None of the bands wanted to go north, Wadsworth wrote. He attributed this reluctance to the ease with which they were receiving rations at Fort Walsh, whereas further north they had to work for rations.[220] He also considered that peaceable "removal" would permit the government to save face should the Indians' situation deteriorate – the government could not be called upon to provide rations on humanitarian grounds if it had no representatives in the area:

> Colonel Irvine ... was quite in favor of this plan of removal, viewing it in the same light as I did, that instead of coming to loggerheads with the Indians through forcing them to leave here, they can be left helpless with no other course than to follow us, which in my opinion would increase our prestige with them, thus to remain here and be forced to yield to their wishes against our own judgement in fact it would be a moral [illegible].[221]

---

[217] E.T. Galt to recipient unknown, August 5, 1881 (ICC Documents, p. 117), and T.P. Wadsworth to recipient unknown, August 15, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 118-19).

[218] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to E.T. Galt, Assistant Indian Commissioner, August 8, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 120-23).

[219] Cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p. 6).

[220] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 29, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 124-35).

[221] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 29, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 124-35).

After Wadsworth and Colonel Irvine had "explored the country adjacent to the Cypress Mountains, and which was spoken of as the country they [the Assiniboine] would choose to settle in," Wadsworth wrote again from Fort Walsh to elaborate on his reasons for advocating closure of the fort and for driving the Indians far from the Cypress Hills.[222] He concluded that simply leaving the hills to avoid the problem of summer frosts would create another problem: an alternative reserve in adjacent country located eight or 10 miles from timber. To illustrate the difficulties he anticipated with this course of action, Wadsworth wrote:

> I have seen the result of locating Indians a distance from timber practically demonstrated in the situation of the present Reservation altho' a year and a half have elapsed since the Indians first settled there not a house for these has been built during last winter the fences were used as fuel, and it has taken the greater part of this summer after the crops were put in to replace these to be again burned (possibly) this coming winter.[223]

Wadsworth recognized that the area could be productive, but, as this August 29, 1881, letter demonstrates, he cast doubt over the Assiniboine's ability or, more correctly, their future opportunity to farm there:

> That the land has made a wonderful return to us, and should have had two consecutive crops [illegible] a yield and sample of wheat equal to any in the Territories prove that it is adapted for agriculture but *to allow our Indians to settle* there would I am afraid never prove a success particularly as other sections of this great country contain the requisites of timber, good land, and pure water, plentiful and combined.[224]

It is hard to know whether the Indians with whom Wadsworth was meeting at Fort Walsh had absorbed or embraced the concept of being permitted to settle by the government. Given that they had been putting in crops, they might have perceived the harvest as a return of the land to them.

Fort Walsh, Winter 1881–82

On November 1, 1881, Agent Denny wrote to Dewdney that Little Child and "a large camp of Assiniboine are near the foot of the mountain." With respect to the farm, Denny advised that English was short-handed, certain Indians had agreed to go to Qu'Appelle, and he had announced that the farm would be closed:

---

[222] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to L. Vankcughnet, Deputy Superintendent General of Indian Affairs, August 29, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 124-35).

[223] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 29, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 124-35).

[224] T.P. Wadsworth, Inspector of Indian Agencies and Farms, to L. Vankoughnet, Deputy Superintendent General of Indian Affairs, August 29, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 124-35). Emphasis added.

> Mr. English has all the potatoes dug, and keeps 10,000 lbs for seed and will have about 60,000 lbs to turn over to the police, with those got from the Indians who have agreed to go to Qu'Appelle. ...
>
> I had to allow Mr. English to pay some Indians in cash to get the crops out, as snow was on the ground and I was afraid they would freeze before being got out. I shall have to hire a good man to help thresh the grain as there is not help enough at the farm. If it is the intention of the Government to close the farm next Spring, as I have already told the Indians, it might be well to do so after the grain is hauled in, as the Indians will congregate at that place and more or less has to be given them, in case they are starving.[225]

Denny did not specify which Indians had "agreed to go to Qu'Appelle."

left to right: Stabbed Many Times and Mrs Carry the Kettle

(ICC Exhibit 8, photo 8)
Provincial Archives of Manitoba EM 465

---

[225] Denny to Dewdney, November 1, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 138-42).

By November 6, 1881, there was a foot of snow at Fort Walsh.[226] Cree and Assiniboine who had gone south of Fort Walsh looking for buffalo along the Missouri River late in the summer of 1881 had returned starving, some without horses.[227] Reluctantly, Agent Denny found he had to increase rations at Fort Walsh.[228] Most of Man Who Took the Coat's camp had come in, but were expected to leave that day. Poor Man's camp was in, and Long Lodge, who had about 15 lodges "towards the foot of the mountain," was thought to be "on the way in."[229] Piapot, with 30 lodges, was camped about 40 miles from the fort.[230] Denny gave ammunition to the most able of the destitute Indians coming in and sent them out again to hunt,[231] but he was already working on the problem of how to get the Assiniboine to leave the area:

> I have been talking to Bear's Head and the Poor Man (Assiniboine Chiefs) about their moving to Qu'Appelle but can get no answer out of them as yet. Mr. English seems to be liked by the Assinaboines [sic] & I think that if he could go with them in the spring to Qu'Appelle, it would not be hard to get them off. With your permission I would speak to Mr. English about going with them.[232]

In the end, that is what happened.

By December, Denny was also advocating closing Fort Walsh. Convinced that, with the NWMP and the Indian Department there, the Indians would always make Fort Walsh "a center," Denny considered "the only way to get them on to their reserves is for this place to be abandoned."[233] He advised Dewdney on December 6, 1881, that he was announcing this plan:

> I have been and am still notifying all the Indians that the place is going to be abandoned next spring since some of the Chiefs have already promised to go to Qu'Appelle

---

[226] Agent Denny, Fort Walsh, to Indian Commissioner, Winnipeg, November 16, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 146-50).

[227] Sir Cecil E. Denny, *The Law Marches West*, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 169.

[228] Denny to recipient unknown, November 9, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 143-45).

[229] Agent Denny, Fort Walsh, to Indian Commissioner, Winnipeg, November 16, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 146-50).

[230] Agent Denny, Fort Walsh, to Indian Commissioner, Winnipeg, November 16, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 146-50).

[231] Denny to Dewdney, November 20, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 151-54), and Denny to Dewdney, December, 14, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 190-96).

[232] Denny to recipient unknown, November 9, 1881, NA, RG 10, vol. 3744, file 29506-1 (ICC Documents, pp. 143-45).

[233] Denny to Indian Commissioner, 6 December 1881, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 181-89).

> I tell them all that if they go before me [sic] as they will get help to go with but if not they will be out of luck.[234]

Any hesitancy Dewdney may have felt about this approach was not apparent until February 1882.

Roughly a week before Denny left Fort Walsh, his replacement, Acting Indian Agent J.N. McIllree of the NWMP, had also written to Dewdney. Ostensibly seeking direction, he actually advised Dewdney of his intention to close the farm, which by this date must have been a reference to Maple Creek Farm.[235] In a letter dated January 9, 1882, McIllree outlined the current state of affairs at Fort Walsh:

> I have before the beginning of this month issued very little food and have kept the Indians out hunting and fishing as long as the buffalo lasted but have had to give in at last and put a good many more Indians on the ration. ... I should think there were about 2,000 Indians round the Cypress, half of which number are here.
>
> ... [Piapot] said he would go next spring to Qu'Appelle ... he also wishes his brother Little Pine to go with him ... I think we can get these two camps down in the spring ...
>
> I have sent three or four lodges north and a few to the Qu'Appelle this winter ...
>
> If the farm is to be worked it will keep the Indians round and a large outlay will have to be made in the way of horses, etc. as there are now only two horses on the farm two but police horses having died this winter and the rest with a wagon having been sent to Qu'Appelle last fall, I have been telling the Indians that the farm would be abandoned next summer telling them at the same time they would get a better place at Qu'Appelle. As yet I have heard no decided answer from the Assiniboines, who do not like to leave their country.
>
> All the Assiniboine Chiefs except Long Lodge are here. The Assiniboine tell me that they have heard that Long Lodge has joined the Southern Assiniboines and does not intend to return here.[236]

McIllree mentioned that smallpox was spreading in Montana. He thought it would send some people back "if it gets among our Indians."[237]

Denny formally handed over the Fort Walsh Indian Agency to McIllree on January 17, 1882. Denny wrote to his superior that he had informed the Indians of this development. In the same letter he noted:

---

[234] Denny to Indian Commissioner, 6 December 1881, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 181-89).

[235] J.N. McIllree to Dewdney, January 9, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 208-15).

[236] J.N. McIllree to Dewdney, January 9, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 208-15).

[237] J.N. McIllree to Dewdney, January 9, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 208-15).

> English came in today and has been informed of the change, he will keep on the same.
>
> It would be well to have it settled whether the farm is to be carried on next spring or not as a great deal of the wheat that would have to be saved for seed could be fed to Indians, also the potatoes.
>
> I think most of the Assiniboine will go to Qu'Appelle in the spring, if encouraged to do so.[238]

Preoccupied as the Indian agents were with managing the overwhelming numbers of Indians who gravitated to Fort Walsh, it appears that they, too, lost sight of the fact that a reserve had already been selected by and surveyed for the Assiniboine Band in the Cypress Hills.

Peter Hourie, an interpreter for the government, wrote to Dewdney from the "Indian Office, Fort Walsh," on January 25, 1882, expressing regret that Denny had to leave Fort Walsh. Hourie and Denny had been "getting on very well with the Indians," to the point that Hourie thought "we would have got them all to go down to Qu'Appelle."[239] Hourie was still trying to persuade them on his own, telling them that, if they did not "go and take up good Reserves," they "would injure themselves in the end, for soon the country will be filled up by white people and the best of the land taken."[240]

Second Attempt to Settle Band at Maple Creek, February 1882

A February 1, 1882, report by Colonel Irvine anticipated the abandonment of Maple Creek Farm, the reserve in the Cypress Hills, and Fort Walsh:

> [T]he Indian Department do not consider that the farming operations at Maple Creek have been successful in the past, and that they are still less likely to prove so in the future. I am also of the opinion, so I understand is the Indian Commissioner, that all the Indian Reservations (excepting those in the Macleod district) should be established further north. If, then, Maple Creek Farm is to be abandoned and another reservation located in the vicinity of the Cypress Hill, I consider that retaining Fort Walsh as a Police Post will act in a manner calculated to become detrimental to the police of the Government, inasmuch as retaining this post offers an inducement to the Indians of the north to abandon their reservations and move towards Fort Walsh, now that a Police post is maintained and an Indian Agent stationed there.[241]

---

[238] Agent Denny to recipient unknown, January 17, 1882, NA, RG 10, vol. 3577, file 444 (ICC Documents, pp. 216-18).

[239] Peter Hourie to Dewdney, January 25, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 219-21).

[240] Peter Hourie to Dewdney, January 25, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 219-21).

[241] Canada, Parliament, *Sessional Papers*, 1882, No. 18, "Annual Report of the Department of the Interior for the Year Ended 30th June, 1881," Part III, North-West Mounted Police Force, A.G. Irvine, Commissioner, North-West Mounted Police, to Minister of the Interior, February 1, 1882, as cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p. 9).

Although there is no reference to it in Irvine's report, Dewdney still recognized, in February 1882, that the Assiniboines had a right to decide about moving away from the Cypress Hills. Asked to report on Agent Denny's proposition to discontinue Maple Creek Farm in the Fort Walsh District, Dewdney wrote to Macdonald:

> [I]f [the Assiniboine] assent to go north we will abandon the farm. If not as this country is the Assiniboines old hunting ground I do not see how we can force them to move unless with their consent.[242]

Based on the documentation assembled for this claim, it appears that Dewdney and Walsh were the individuals most mindful of the Assiniboine Band's connection to the Cypress Hills. Four and a half years earlier, Walsh had asserted that "[t]he Assiniboine must be paid here [in the Cypress Hills], this being their country and the majority of them could not be induced to go elsewhere."[243] Dewdney's letter reminded Macdonald of this need for consent. Just two days after Dewdney wrote to Macdonald, Agent McIllree informed Dewdney that the Assiniboine – represented by Man Who Took the Coat, Bear's Head, and Poor Man, with Long Lodge absent – "wanted to remain in this section of the country and settle permanently on Maple Creek reserve."[244] On Dewdney's instructions, McIllree "had urged on them the expediency of removing from the Cypress Hills and taking up a reserve somewhere north of here or in the Qu'Appelle country." The reasons McIllree gave the Assiniboine are not outlined in his letter to Dewdney.[245]

As expressed by McIllree, the Assiniboine's main reasons for not wanting to move were "that they had been brought up in the Country, that although they had given up their Country to the Queen, she had promised to give them a Reserve in whatever part of the Country they liked to pick out, that they did not like the Northern Country or the Indians living there."[246] Man Who Took the Coat hoped the government would not be angry with him if he wanted to remain where he was.[247]

---

[242] Indian Commissioner Dewdney to Superintendent General of Indian Affairs, February 13, 1882, no reference available (ICC Documents, p. 228), and Acting Agent McIllree to Dewdney, February 15, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 224-27). The second letter confirms that the discussion is about Maple Creek Farm, and not the farm begun on the Assiniboine reserve.

[243] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxxiv (ICC Documents, pp. 39-42).

[244] Acting Agent McIllree, Fort Walsh, to Indian Commissioner Dewdney, Ottawa, February 15, 1882 (ICC Documents, pp. 224-27).

[245] Acting Agent McIllree, Fort Walsh, to Indian Commissioner Dewdney, Ottawa, February 15, 1882 (ICC Documents, pp. 224-27).

[246] Acting Agent McIllree, Fort Walsh, to Indian Commissioner Dewdney, Ottawa, February 15, 1882 (ICC Documents, p. 225).

One week later, Dewdney was prepared to give the Assiniboine their Treaty 4 entitlement of oxen and implements "to farm at Maple Creek" if they were not to be persuaded to go to "settle upon a Reservation near Qu'Appelle."[248] But Dewdney feared the influence this exception could have on others. He reminded McIllree that, if the Assiniboine took their treaty-allotted agricultural assistance at Maple Creek, no other Indians would be able to stay there:

> No Cree Indians nor half breeds will be permitted to occupy the Reserve or be allowed to farm there, and if the Assiniboine allow the Crees to stay about and help eat up their grub they (the Assiniboine) will suffer, for only a supply will be sent in sufficient for the Assiniboine.[249]

Dewdney concluded his instructions to McIlree by stating that he hoped the Assiniboine would not remain at Maple Creek:

> Should the Assiniboine change their minds and agree to go to Qu'Appelle, assistance will be afforded to enable them to do so, and as this is the particular wish of the government, you should exhaust every means to bring it about before proceeding with farming at Maple Creek.[250]

No documentation in this inquiry itemizes precisely the agricultural items the Assiniboine may have been given at their reserve in the Cypress Hills. Marginalia on an April 26, 1882, letter from Dewdney to the Superintendent General alludes to "implements ... in Treaties 4 & 6 and ... the nos. of axes and hoes in the various reserves."[251] It seems reasonable to assume that there would have been some farm implements in use and livestock present when English was overseeing the tending of crops on the lands surveyed by Patrick in the Cypress Hills.

---

[247] Acting Agent McIllree, Fort Walsh, to Indian Commissioner Dewdney, Ottawa, February 15, 1882 (ICC Documents, p. 225).

[248] Dewdney to McIllree, February 22, 1882, NA, RG 10, vol. 3577, file 444 (ICC Documents, pp. 229-32).

[249] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 47).

[250] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 47).

[251] Dewdney to Superintendent General, April 26, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 235-36).

MOVE TO QU'APPELLE, SPRING 1882

In keeping with what seemed to be the message from Macdonald, McIllree's orders from the Indian Commissioner's office were that "the express wish of the Government was to see all Indians North of the CPR."[252] McIllree continued to press the Indians to move north, but they advised him they would not answer until after they met with Colonel Irvine.

Irvine was not at Fort Walsh during the winter of 1882.[253] Nevertheless, a March 1882 telegram directed McIllree: "Transport all destitute Indians ready to move north as economically as possible."[254] Irvine returned to the fort on April 8, 1882, ready to pursue the government's plan with new vigour:

> Soon after my arrival at Fort Walsh in April last, I commenced holding councils, with Indians (Crees and Assiniboine) with a view to persuading them to move northward to settle upon the new reservations.[255]

The Assiniboine put up considerable resistance, which Irvine seemed to understand:

> In the case of the Assiniboine I also experienced much trouble. These Indians have always looked upon the Cypress Hills as their home. It is not therefore, to be wondered at that I had considerable difficulty in inducing them to accept a new and northern reserve.[256]

As Irvine recalled it, the Assiniboine did agree to move to "new" reserves:

> "The-man-that-took-the-coat" or "Jack" was the first Assiniboine Chief who consented to proceed to the reservation allotted him by the Government.
>
> I afterwards secured a promise from "Long Lodge," "The Poor Man," "Bear's Head" that they and their people would accept new [sic] the reservations as allotted by the Indian Department. "Long Lodge's" reservation near Qu'Appelle, "The Poor

---

252 McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

253 McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

254 McIllree to Superintendent General of Indian Affairs, March 23, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 233).

255 Report of Irvine, Canada, "Settlers and Rebels: Being the Official Reports to Parliament of the Activities of the Royal North-West Mounted Police Force from 1882-1885," as cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p. 11), and Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 51).

256 Report of Irvine, Canada, "Settlers and Rebels: Being the Official Reports to Parliament of the Activities of the Royal North-West Mounted Police Force from 1882-1885," as cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p.11).

> Man," and "Bear's Head," in the vicinity of Battleford, their previous reservations having been at Maple Creek near Fort Walsh.
>
> The Assiniboine chiefs "Jack" and "Long Lodge" left Maple Creek farm in charge of Mr. English, farm instructor, being accompanied by a small detachment of police and straggling Crees belonging to "Little Child's" and "Sparrow Hawk's" bands they reached Qu'Appelle on the 1st of June. I was afterwards informed that their reserve had been selected at Indian Head, about twenty-four miles south-east of Qu'Appelle.
>
> "Bear's Head" and "Poor Man" (Assiniboine) left Fort Walsh on the 23rd of May for Battleford, they were accompanied by a constable of the force who issued rations while en route. They arrived at Battleford on the 17th June.[257]

In a later report to Dewdney, McIllree detailed some of the groups that had agreed to move to these "new" reserves:

> All the chiefs in the neighborhood assembled to meet [Colonel Irvine] and day after day the talk went on whether they would move as desired or remain where they were. All at last agreed to do as the Govt wished. The Assiniboine first, though they felt it hard to leave the Cypress Hills. Then Piapot said he would go and these were really the only two bodies of Indians who had any claim to call the Cypress Hills their own. The remainder belonged to the Saskatchewan Valley mostly. The Assiniboine and Piapot's band being very poor and owning no horses, it was agreed that transport should be furnished them. A few other smaller bands were promised the same privilege. As it was impossible to [illegible] transport at that time the Assiniboine were sent to Maple Creek Farm and the Crees to David Lake, where Piapot had been camped all winter.
>
> ...
>
> On the 12th Long Lodge, Head Chief of the Assiniboine, got in. He after numerous interviews with Col. Irvine said he would go to Qu'Appelle and was sent out to Maple Creek Farm to the fishing ground.[258]

Maple Creek Farm was closed once the Indians were bound for their respective reserves.[259] About this time, April 1882, the Crown granted John Adams a timber lease to cut timber in the Cypress Hills.[260]

From Fort Walsh, Irvine advised Ottawa, on April 20, 1882, that all Assiniboine had agreed to move and that some had already left:

---

[257] Report of Irvine, Canada, "Settlers and Rebels: Being the Official Reports to Parliament of the Activities of the Royal North-West Mounted Police Force from 1882-1885," p. 3, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 51).

[258] McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

[259] McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

[260] Russell to Adams, April 22, 1882, RG 15 [incomplete reference], in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 40).

> All the Assiniboine have agreed to go north. South Assiniboine to Qu'Appelle, North Assiniboine to Battleford. The Man That Took the Coat, Assiniboine Chief, with his camp left here yesterday for Fort Qu'Appelle.[261]

Food shortages became a factor in the move. It was not until May 7, 1882, that the Assiniboine actually left Maple Creek Farm for Qu'Appelle in the company of their farm instructor, Mr. English.[262] As McIllree reported:

> On the 7th May having secured sufficient transport, I accompanied Col. Irvine to Maple Creek Farm and made final arrangements for the Indians collected to move the next day, they were both loath to go, but we started according to promise, consisting of the following Chiefs and their bands: Long Lodge, Jack, Little Child, Sparrow Hawk and some independent bodies of Indians going to join their respective chiefs in the vicinity of Qu'Appelle ...[263]

That rations were actually cut off to force the Assiniboine to move was considered by both Mr Gallo and Mr Benson in this inquiry. In his report for Canada in this inquiry, Gallo states that "rations were refused the bands at Fort Walsh *after* they had consented to move north and then refused to do so,"[264] and "[i]n the spring of 1882 the Cree and Assiniboine were told no further rations would be issued to them while they remained in the Cypress Hills."[265] Similarly, in his report for the First Nation in this inquiry, Benson commented that "McIllree refused rations to anyone not willing to leave immediately for their reserves."[266]

So many Indians had been convinced to go to Qu'Appelle that the government faced difficulty feeding them there.[267] Others who were willing to go could not because the government could not give them enough supplies to make the trip.[268] It was also known that it would be difficult to supply Treaty

---

[261] Irvine to Fred White, April 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 234).

[262] Galt to Vankoughnet, May 22, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 400), and Dewdney to Superintendent General, 22 May, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 243-44).

[263] McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

[264] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 46).

[265] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 46).

[266] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt III, p.12). Benson's citation for this is NA, RG 10, vol. 3722, file 29506-2.

[267] Commissioner's Office to Vankoughnet, April 24, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 396-99).

[268] McIllree to Dewdney, May 3, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 242).

4 provisions in full to the Indians on their arrival at Qu'Appelle because of shortages.[269]

Dewdney made plans to meet the Indians on their arrival at Qu'Appelle and reassured Macdonald on April 26, 1882, that he would "endeavour to make them satisfied with the change."[270] In anticipation, Dewdney had instructed the Indian agent at Qu'Appelle, Alan McDonald, to break some land.[271] Two reserve areas were identified:

> I have directed Mr. Agent Macdonald [sic] to get ploughing done in patches of 10 acres about 1 mile apart on the Reserve at Indian Head, south of Qu'Appelle, also on the Reserve east of Long Lake, in order that some crop may be put in this spring.
>
> If there is no hitch in getting the Indians to settle on the Reserves, we shall have to provide a number of tools such as axes and hoes. I think it would be well to order 20 doz. axes and handles and the same number of hoes for Treaty 4 and a like quantity for Treaty 6.
>
> I hope to be able to use some of the articles called for in this year's contracts to start the new reserves.
>
> I shall endeavour to carry out the wishes of the Minister and use every exertion to render the Indians satisfied.[272]

A note to the chief clerk on the margin of this letter reads: "Please refer to Mr. Galt's return of implements [illegible] in Treaties 4 & 6 and state the nos. of axes and hoes in the various reserves and the no. of Indians approximately of an age to use such implements."[273]

Irvine was keenly aware of the importance of the Indians being "well received" in the north and treaty obligations being fulfilled. Otherwise, they might not remain there and, Irvine feared, the result would be considerable expense and a threat to law and order:

> If these recommendations are not acted on, I feel that I am not far astray in predicting a general stampede southward. Should this once occur, the final settlement of the Indians on allotted reservations will be materially retarded.

---

[269] Commissioner's Office to Vankoughnet, April 24, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 396-99).

[270] Dewdney to Superintendent General, April 26, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 235-36).

[271] Dewdney to Superintendent General, April 26, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 235-36).

[272] Dewdney to Superintendent General, April 26, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 235-36).

[273] Dewdney to Superintendent General, April 26, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 235-36).

> The experience of our neighbour Americans cannot be without its lesson to us. In their case the non-fulfilment of treaty obligations gave rise to much of the trouble, and expense they had been put to in the governance of their Indians. It is worthy of note too that even with a very strong force at their command it has not been found practical to force Indians to remain on a particular reservation.[274]

Removing the Assiniboine Band from the Cypress Hills did not immediately solve the government's problem at Fort Walsh. In May 1882, about the time the Assiniboine were on their way to Qu'Appelle, Big Bear and hundreds of his Cree followers arrived at Fort Walsh, putting pressure back on the fort and the virtually abandoned Indian Agency there.[275] Moreover, events later proved that the Assiniboine had not seen the last of the Cypress Hills.

THE "NEW RESERVE," INDIAN HEAD, SUMMER 1882

Today, Indian Head, Saskatchewan, is a town south of the Qu'Appelle Valley, 68 kilometres east of Regina. It was named after the hills south of the townsite. The town's first settlers moved to this location in Saskatchewan's richest farming area in 1882, or just before the Canadian Pacific Railway line went through.[276]

In June 1882, in preparation for the arrival of Indians from the Cypress Hills, Agent McDonald requisitioned livestock and agricultural implements in accordance with the undertakings of Treaty 4.[277] Similarly, surveyor John C. Nelson, assisted by David Macoun, identified a site at Qu'Appelle on which the relocated Indians could settle.[278] McDonald, seeing that the site first chosen by Nelson lacked wood, water, and hay, selected another location about nine miles east. The new site was broken for seeding before the Assiniboine arrived.[279]

In early May, Nelson surveyed the "Indian Head Reserves" (220 square miles) for the bands of Man Who Took the Coat, Long Lodge, and Piapot. He described it as "an attractive place for these unsettled Plains Indians. The soil is of the choicest quality; there is a good proportion of hay grounds, wood and plenty of water, and the Canadian Pacific Railway is only a few miles to the north."[280] McDonald was also optimistic:

---

[274] Irvine to Fred White, Comptroller, May 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 249-52).

[275] Irvine to Fred White, Comptroller, May 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 249-52), and Galt to Superintendent General of Indian Affairs, May 22, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 243-44).

[276] "Indian Head," *The Canadian Encyclopedia*, 2nd ed. (Edmonton: Hurtig, 1988), 1055.

[277] Requisition for cattle, implements, etc., Agent A. Macdonald [sic], June 18, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 261).

[278] John Macoun was the professor of botany and geology who had explored the Cypress Hills in 1879 and pronounced them unfit for agriculture. It is not known if the two were related.

[279] McDonald to Galt, June 19, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 253-56).

> I feel certain the Indians will be pleased with their reserve and do well thereon. Its close proximity to the large farms of the Qu'Appelle Valley Farming Company will at all times enable the good workers to secure employment at such times as their attention is not absolutely required on their Reserve for, of course, I shall see that they do not neglect their own to work for outsiders. Besides the farming company, the line of Railway passing within a comparatively short distance from the Reserve, together with the fact that all around them, the land is being rapidly and thickly settled upon by immigrants, assures me that those Indians will not remain long a heavy burden on the Government. The past record of the Assiniboines shows that they are good workers and with the facilities to procure work as I have pointed out surrounding them, I have no fear as to their ultimate future, for of course, we will have to feed and help them until they get settled.[281]

The Assiniboine (numbering 157 with Man Who Took the Coat and 97 with Long Lodge) arrived at Qu'Appelle "from Ft. Walsh District" with English on June 9, 1882.[282] The following day Dewdney and McDonald supplied them with three days' rations of flour and bacon, "together with some tea, tobacco, and pemican as presents from the Commissioner."[283] On June 12, the Indians met with Dewdney in Major Walsh's tent.[284] McDonald's account of the meeting mentioned "signs of discontent" and "unwillingness to go to their Reserve," but, he reported, the Chiefs agreed to view it with Dewdney and Walsh. Once they had seen it, McDonald wrote that "they expressed themselves perfectly contented with the choice of the Reserve that had been made for them, and stated their willingness to go off as soon as we could get transport."[285] At subsequent meetings with the agent and the Commissioner, the terms of Treaty 4 were read and explained to the Assiniboine.[286] The chiefs each received a yoke of oxen, a harness, and a wagon, with the explanation that they would get the rest promised under treaty once they had settled on their Indian Head reserve.[287]

---

[280] Dewdney to McDonald, December 29, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 354-55).
[281] McDonald to Galt, June 19, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 253-56).
[282] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).
[283] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).
[284] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).
[285] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).
[286] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).
[287] McDonald to Galt, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 257-60).

On June 21, 1882, Man Who Took the Coat's band (255 people) and Long Lodge's band (91 people) set out from Qu'Appelle to go to their reserve at Indian Head. Piapot and his followers had not yet arrived but three areas were selected within the reserve for the respective bands.[288] By July 18, 1882, McDonald reported that "'Jack' (Man Who Took the Coat) and his Indians were all hard at work and perfectly happy" on the Indian Head reserve. They were "under the charge of Mr. Instructor Provost ... [but] owing to the lateness of the season, only a few bushels of potatoes were planted."[289]

On arriving in late July 1882, Piapot made it clear to McDonald that he had expected to choose his own reserve, not to have it chosen for him.[290] McDonald countered that "they were to choose reserves for themselves wherein they might farm."[291] Stressing that the other Chiefs had done so and "were contented" and that Piapot was the "last" to go on his reserve,[292] McDonald convinced Piapot, with a present of "Tobacco, Pemican 3 bags, dried meat, 2 bags, and 1 ox," to tour the other reserves with him and to "inspect the location selected for him."[293]

Long Lodge's band was less than content.[294] Lack of fresh meat and vegetables and the resulting illness soon affected morale at the Indian Head reserves. McDonald's instructions were to issue as few rations as possible to Indians who did not work.[295] McDonald was frustrated by the restrictions on his purchasing power, since he knew this lack of rations could jeopardize the effort to settle the Indians on the northern reserves.[296]

Long Lodge and 18 lodges were the first to leave the Indian Head reserve,[297] departing in August 1882 for the Wood Mountains and eventually south of the border for the winter of 1882–83. Soon after, Man Who Took the Coat departed apologetically for Fort Walsh.[298] The report of those events shows that the Assiniboine were unhappy, still hoped for a reserve in the Cypress Hills, and were not ready to accept agricultural assistance, at least in the form of treaty-allotted implements:

---

[288] McDonald to Galt, July 12, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 265-74).

[289] McDonald to Superintendent General of Indian Affairs, December 29, 1882 (ICC Documents, p. 357).

[290] McDonald to Galt, July 29, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 290).

[291] McDonald to Galt, July 29, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 293).

[292] McDonald to Galt, July 29, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 293).

[293] McDonald to Galt, July 29, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 296-97).

[294] McDonald to Galt, July 18, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 275-79).

[295] Dewdney to Superintendent General of Indian Affairs, August 5, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 280-81).

[296] McDonald to Galt, July 31, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 283-88).

[297] McDonald to Galt, August 1, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 282).

[298] Nelson to Superintendent General of Indian Affairs, Canada, Parliament, *Sessional Papers*, No. 5, "Report of the Department of Indian Affairs for the Year Ended 31st December, 1882," 214-15 (ICC Documents, pp. 356-57).

> The Assiniboine were induced to take a reserve at the Indian Head. They at first appeared fully contented but towards payment time became unsettled and restless, they stated they could not live on bacon, and had always been accustomed to live on fresh beef. In order that they should have no excuse in that respect, I ordered beef three times a week; this satisfied them for a time, but after payment they returned everything that they had received from the Government in the way of tools, etc, and said they must go south. The chief, The-man-that-took-the-coat, came to me with his men and said that he would not leave, as his brother chief, Long Lodge, had done, without telling me why he did not like to stop north; he said he was pleased with the way that he had been treated, but his people did not like the place, that their friends all lived south, and that their old people were buried there, they begged for a reserve in the south.[299]

Agent McDonald's reply was as follows:

> I informed them that the Government did not intend to give any reserve in the south, and if they did so, the American Indians would be continually crossing the border to steal horses, and there would be continual trouble.[300]

In contrast to the "contentedness" expressed by Agent McDonald, Kaye Thompson's presentation on behalf of the elders of Carry the Kettle First Nation at the May 30, 1997, community session in this inquiry expressed some of the reasons her people were reluctant to settle at Indian Head. The bountiful Cypress Hills were regarded as the Assiniboine's homeland.[301] Their dead were buried in the Cypress Hills, not around Indian Head, where the memory of the deaths of others lingered, even in the name Skull Mountain:

> No one wanted to live in the Indian Head area, where "Wacapaxa" – Skull Mountain, was located since this is the burial grounds of another tribe. This land was not as lucrative in terms of provisions necessary for survival as was Cypress Hills and our people continued to suffer from malnutrition.[302]

---

[299] Report of Agent McDonald to Superintendent General of Indian Affairs, December 15, 1882, Canada, Parliament, *Sessional Papers*, 1883, No. 5. Gallo cites this as Commissioner Dewdney to the Superintendent General, Indian Affairs, Annual Report for 1882, p. 194, in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 55).

[300] Report of Agent McDonald to Superintendent General of Indian Affairs, December 15, 1882, Canada, *Sessional Papers*, 1883, No. 5.

[301] "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 11).

[302] "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 11).

Nonetheless, the government curtailed their movements to keep them at Indian Head:

> With the introduction of the permit system, our people were denied the freedom to return to their homeland. It has been told from generation to generation that this reserve in Cypress Hills is there for them always. Elders have always said, "Our heart is not here. Our heart is in Cypress Hills." The old people longed to return to their homeland. Our medicine people continued to return to this area for the purpose of acquiring needed roots, plans, and paint. Pipe keepers have continued to offer the perennial ceremonies required for our dead relatives whom are left behind in the Cypress Hills.[303]

The memory of lives lived and lost in this beautiful but troubled area had not been forgotten in 1882 and remains vivid to this day.

Fort Walsh, Fall 1882

Irvine reported some 2000 starving Indians at Fort Walsh in September 1882. They said it was their country and that they intended to remain there. They were asking for food and, if it were not given, Irvine feared, they might "commit depredations" to acquire it.[304] Conscious of their shared confidence-building role, Irvine wrote Dewdney:

> The actual power of the Indians now here, in view of future hostility, is certainly not great. But as it is superfluous to point out to you, an outbreak of any kind would be disastrous, and create universal alarm throughout the country.[305]

Comptroller Fred White of the NWMP was dispatched to investigate. He confirmed that the Indians were desperate and not prepared to leave the area:

> Of course they have asked again to have reservation here & say they may as well starve to death here as on the reservations north and east, but many of them are in such desperate condition that I fear hunger may impel them to commit illegal acts, and as large working parties are now grading the C.P.R. north of here it would be a pity to risk trouble this winter. Limited rations, absence of game, scarcity of clothing and the suffering they must endure this winter owing to the tattered condition of their lodges, will I hope bring them to their senses by next spring.

---

[303] "Summary of Cypress Hills Claim," presentation of Elder Kaye Thompson at community session 1, May 30, 1997, Maple Creek, Saskatchewan (ICC Exhibit 7, p. 11).

[304] Irvine to Dewdney, September 23, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 305-6).

[305] Irvine to Dewdney, September 23, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 305-6).

> Under all the circumstances, though with great reluctance, I have telegraphed asking you to send [Agent] McDonald from Qu'Appelle to pay them. He knows who have been paid and who are entitled to pay and for other reasons it is better that the payments should not be made by the Police.[306]

Eventually, McDonald paid Treaty 4 annuities at Fort Walsh in mid-November 1882.[307]

In October 1882, interpreter Peter Hourie reported to McDonald that he would likely have to remain at Fort Walsh for the winter because there were about 290 lodges there.[308] These included Piapot's Crees, some of the Assiniboine who returned from Qu'Appelle (he did not identify the bands), and some Crees from the north and elsewhere.[309] Although the buffalo were reported to be plentiful to the south, American troops were ready to apprehend any Indian hunters who crossed the border, and so a congregation of needy Indians at Fort Walsh was considered dangerous.[310]

In his letter, Hourie also commented on the general state of affairs and on the Assiniboine leaving Qu'Appelle:

> I am of opinion that as long as there will be Indians at this place, that it will give the Government some trouble to keep these people quiet and not only that but it will be the means of creating a row between the two governments.
>
> I hear lately that some of the Assiniboine, The-man-that-took-the-coat had arrived at Wood Mountain. I am sorry that they are all leaving their Reserves if there be any truth in it. What a pity they could not be kept down there.[311]

Wood Mountain was less than 50 kilometres from the border and about 200 kilometres east of Fort Walsh. Man Who Took the Coat stopped there on his way to Fort Walsh.

Since White feared that many Indians would perish from the cold while wintering at Fort Walsh, he urged Dewdney to instruct McDonald to come to the fort to make payments.[312] Correspondence consequently ensued between the Deputy Superintendent General of Indian Affairs, Lawrence Vankoughnet, and John A. Macdonald, about relief supplies, the necessity of sending Agent

---

[306] White to Dewdney, October 17, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 298-300)

[307] McDonald to Dewdney, November 11, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 313-15)

[308] Hourie to McDonald, October 18, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 311-12)

[309] Hourie to McDonald, October 18, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 311-12)

[310] Hourie to McDonald, October 18, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 311-12)

[311] Hourie to McDonald, October 18, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 311-12)

[312] Hourie to McDonald, October 18, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 311-12)

McDonald to Fort Walsh, and the concern that "if Piapot is given Reserve south we will not get our Indians to go north."[313]

In the course of instructing Irvine on October 27, 1883, Dewdney blamed this crisis on the NWMP's failure to close the fort when the Indian Agency there was withdrawn.[314]

> I think it is very unfortunate the Post at Walsh had not been abandoned this summer as agreed upon last winter in Ottawa. The Indians will not now believe that the Post is to be abandoned and we will have considerable difficulty in inducing them to leave.
>
> You are aware that the Southern Country is not the Country of the Crees and they should be told that it is no good their making a request to be given Reserves in the South.
>
> I hope you will impress upon the Indians that they have brought their present helpless condition on themselves, that they have been warned that they would suffer if they remained South and the longer they continue to act against the wishes of the Govt the more wretched will they become.
>
> I should regret very much to see the Indians come into conflict with the force as you appear to apprehend, but should such be the case I trust you will recollect that over and over again you have been instructed to inform the Indians that the payments would not be made, neither would the Indians be fed at Ft. Walsh. This was done in anticipation of the Post being abandoned as agreed upon.
>
> Mr. McDonald has gone to Ft. Walsh to make the payments which I have, with great reluctance assented to he will also report to me the necessity of sending in supplies. If it is absolutely necessary to feed the Indians they will have to go to Swift Current Creek as supplies can then be sent from Winnipeg.[315]

Annuity moneys were distributed by McDonald at Fort Walsh over the course of some 20 days beginning on November 8, 1882.[316] He was not sympathetic to the Indians' plight:

> The Indians look very bad, I know they are not getting enough flour but I like to punish them a little. I will have to increase their rations, but not much.
>
> ...
>
> I say let us get the Indians through the winter the best way we can feeding them is the cheapest. The Railroad is progressing well and it would be a pity that anything should spring up which would be an excuse for the Indians to cause trouble now.

---

[313] Vankoughnet to Macdonald, October 25, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 405-9).

[314] Had Fort Walsh closed in 1882 its closure would have coincided with the establishment of the provisional districts of Athabaska, Alberta, Saskatchewan, and Assiniboia. Assiniboia began at the Manitoba border and extended westwards along the United States border partially into what, in 1905, became the province of Alberta.

[315] Dewdney to Irvine, October 27, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 307-9).

[316] McDonald to Dewdney, November 11, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 313-15), and McDonald to Dewdney, November 21, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 412).

> There are some very ill disposed Indians here, year by year they have been getting less and a few months more will I think see very few on these hills.[317]

McDonald thought the Indians would leave the area on their own "in the spring or as soon as the Police go from here: there will be nothing to keep them and the fear of the Indians south and west will make them abandon Cypress Hills."[318]

Fort Walsh, Winter 1882–83

During the winter of 1882–83, with McIllree at Fort Calgary[319] and no Indian Department staff at Fort Walsh, Dewdney recommended that NWMP Inspector Frank Norman be delegated to issue food rations to the Indians.[320] White suggested that it would be preferable to have an officer of the Indian Department at Fort Walsh, however:

> Very considerable tact and discretion will have to be exercised in getting the Indians now there moved to their Reserves and complications with them may be avoided if a responsible officer with powers to act, beyond the mere issuing of rations, is in the vicinity.[321]

If the Minister's decision was to leave Norman in charge of the Indians at Fort Walsh, White felt Norman should be entirely relieved of police duty.[322]

Faced with "sometimes over four thousand Indians in the immediate vicinity of Fort Walsh ... in a very deplorable and starving condition," Norman refused to further reduce the food allowance as instructed.[323] As it was, for every seven days he was issuing each Indian sufficient flour and meat to last just two days.[324] In January 1883, Norman had to borrow from the NWMP stores to meet the demand for rations.[325] By the beginning of February, supplies were running out entirely. Deep snow made it impossible to travel the

---

[317] McDonald to Dewdney, November 11, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 410-11).

[318] McDonald to Dewdney, November 11, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents pp. 313-15).

[319] McIllree to Dewdney, December 2, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 316-28).

[320] Dewdney to Superintendent General of Indian Affairs, December 6, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 413).

[321] White to recipient unknown, December 19, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 414-15).

[322] White to recipient unknown, December 19, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 414-15).

[323] Norman to Dewdney, December 27, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 329-30), and Galt to Superintendent General, December 28, 1882, NA, RG 10, vol. 3744, file 29506-3(ICC Documents, p. 418).

[324] Norman to Dewdney, December 27, 1882, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 329-30).

[325] Norman to Galt, January 3, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 419-20).

43 miles to the end of the CPR track to pick up the flour available there.[326] Nor could supplies be obtained from Fort Benton, which was 200 kilometres south of Fort Walsh.[327]

Return to Indian Head, Spring 1883

In his year-end report for 1883, Dewdney remarked that the "large sum" that had been expended in 1882 to assist Indians "to remove to their reserves" was effectively "thrown away" when so many returned to Fort Walsh for the winter of 1882–83. Fearing that "more serious complications of an international nature" would arise in 1883 from their "horse-thieving expeditions" into the United States, Dewdney resolved to try again:

> I consequently decided to make another effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion.[328]

Dewdney attributed the Indians' reluctance to relocate to a romantic attachment to a bygone era:

> It is a matter of no wonder that such a strong stand should have been made against our repeated efforts to cause them to leave their old haunts, places associated with thoughts of freedom and plenty, whilst the buffalo roamed the Plains in countless numbers. Leaving these hills behind them dashed to the ground the last hope to which they had so strenuously and fondly clung, of once more being able to live by the chase ...[329]

For government officials in the spring of 1883, the priorities were preserving order in the Regina, Qu'Appelle, and Indian Head areas and trying to banish the remaining Indians from the Cypress Hills. Having wintered poorly at Fort Walsh or elsewhere, the bands of Piapot, Long Lodge, and Man Who Took the Coat had little choice but to return to Indian Head in the spring of 1883. The railway track had been laid, enabling these bands to be sent by train eastwards from Maple Creek,[330] but a derailment during this trip, in which some Assiniboine were injured, heightened their anxiety. On May 25, 1883, the Indian Commissioner in Winnipeg wrote to the Superintendent General in Ottawa to advise him how things were progressing:

---

[326] Norman to Galt, February 8, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 332).

[327] T.G. Baker & Co., Fort Benton, USA, to Galt, February 14, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, p. 331).

[328] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883* (Ottawa, 1884), 98-100, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 56, fn 100).

[329] Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1883* (Ottawa, 1884), 98-100, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 56).

> [G]reat difficulty has been experienced in inducing the Walsh Indians to go to their various Reserves, influence from many sources were strongly bearing upon those who were deciding to go north to change their minds, and not go. The Railway accident which happened to those who were on their way to Qu'Appelle did a great deal towards upsetting their minds and it was with great persuasion that they were induced to go farther, nothing would encourage them to take the cars again, so cart had to be engaged to do the carrying of those unable to walk.[331]

Assistant Indian Commissioner Hayter Reed and Colonel Irvine visited the Indians in May. At the Assiniboine camp, about 15 miles from the rail line at Indian Head, Irvine urged Man Who Took the Coat to remain on his reserve, "which he promised to do."[332] In contrast, Piapot and Long Lodge had grievances that caused them and their followers to move off the reserve, the former stating "that he and his people could not endure the stench that emanated from the dead bodies of unburied Indians then lying on the ground."[333] Irvine wrote of this situation and his concern for law and order:

> These bodies had, in accordance with their usual custom in that respect, been placed in small trees which having been burned down by fire, caused the bodies to drop upon the ground where they remained. He also told me that he was going with his people to some place where they would be able to catch fish sufficient to live upon. I explained to him fully that the Government would not permit in the present settled state of the country, or armed parties of either whites or Indians moving to different parts of the Territories, such a [illegible] being contrary to law and that he had better carefully consider his movements.
>
> I returned here last night and leave today with fifty men and one gun for Qu'Appelle, and will in all probability meet the Indians en route.
>
> My object in going is to guard against their interfering with the settlers in that district [illegible] and I consider that the presence of the Police will have a beneficial effect and be reassuring to the settlers unaccustomed to the habits of Indians and who

---

[330] Sir Cecil E. Denny, ***The Law Marches West***, ed. W.B. Cameron, with a foreword by A.C. Rutherford (Toronto: J.M. Dent and Sons, 1939), 173, 175. After stating that "the Crees and Assiniboine at the Cypress Hills and in the vicinity of [railway] construction at Maple Creek were most troublesome," he points out that many instances of horse stealing were "really the work of white desperadoes following in the wake of construction."

[331] Indian Commissioner to Superintendent General of Indian Affairs, May 25, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 333-35).

[332] Irvine to White, NWMP, May 18, 1883, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, pp. 342-48).

[333] Irvine to White, NWMP, May 18, 1883, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, pp. 342-48).

> might probably view matters in a more serious light than the occasion requires and besides the presence of so large a number of Police might have a good effect on the Indians mind and be the means of inducing them to reconsider their movement and possibly of returning to their Reserve.[334]

When the Assiniboine went to their Indian Head reserve the second time, there were "eighty-six in all," considerably fewer than had arrived the year before. McDonald explained that Man Who Took the Coat had returned with 80 of his followers and Long Lodge's head man named Little Mountain. "We have managed to put thirty-seven acres under crop for them," wrote McDonald on July 6, 1883.[335] Statistics in the department's *Annual Report* indicated that the crops included 22 acres of barley, 6.5 acres of potatoes, 5.5 acres of turnips, and 3 acres of garden vegetables. The yield was 200 bushels of barley and 60 bushels of potatoes.[336]

One month later, the office of the Indian Agent was moved from Qu'Appelle to Indian Head. At the end of August 1883, McDonald reported that, "since spring, Indians have been coming from the vicinity of Cypress Hills and going on their reserve." Piapot and his band were among those who had returned to their reserves.[337]

Government "Success," Fall 1883

By October 1883, Dewdney was satisfied that his "effort to disperse these bands and endeavor to get them to move to those sections of the Territories which they had formerly claimed as their own and had ceded under treaty to the Dominion" had been successful, and that the Assiniboine "placed on their reserve at Indian Head are now quite contented and doing well."[338] Dewdney's October 24, 1883, letter to Macdonald detailed the attitudes and ideas that had motivated him over the previous three years:

> Being aware of the importance attached by you of relieving that part of the country adjacent to the International Boundary line of those of our Indians who have for some

---

[334] Irvine to White, NWMP, May 18, 1883, NA, RG 10, vol. 3745, file 29506-4, pt 1 (ICC Documents, pp. 342-48).

[335] Agent McDonald to Superintendent General of Indian Affairs, July 6, 1883, Canada, *Annual Report for the Department of Indian Affairs for Year Ending 31st December 1883* (Ottawa, 1884), 73-75 (ICC Documents, pp. 356-57).

[336] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 38).

[337] Agent McDonald to Superintendent General of Indian Affairs, August 31, 1883, Canada, *Annual Report for the Department of Indian Affairs for Year Ending 31st December 1883* (Ottawa, 1884), 73-76 (ICC Documents, pp. 358-59).

[338] Dewdney to Superintendent General of Indian Affairs, October 2, 1883, Canada, *Annual Report for the Department of Indian Affairs for Year Ending 31st December 1883* (Ottawa, 1884), 98-100 (ICC Documents, pp. 360-62).

> years past looked upon it as their wintering ground, I have the honor to report that, during the past summer my efforts have in a great measure been framed in order to accomplish this end.
>
> Need I assure you that not a little time was necessarily occupied in this endeavor, as with a pardonable jealousy the Indian clung to those haunts which were the scenes of his brightest days, feeling loath to leave a country where many of them had been nurtured and experienced the delights of the chase & [illegible] he might never again return. Moral suasion and it alone was the only means adopted by me in accomplishing what [illegible] in view and this with Indians means [illegible] and a constant repetition of grounds already gone over.
>
> I feel happy in being able to report that out of the 300 or 400 lodges, representing over 3000 Indians, which frequented the country in question, at the time of writing but few remain – some 30 or 40 lodges – and these can be moved at any moment if considered advisable.
>
> To give a succinct report of my doings in the matter, I would state, that last April I decided to send my Assistant Commission to meet these Indians at Cypress Hills, some 30 odd miles north of the line, and this gentleman, although they advanced all manner of reasons for not complying with his requests as regards quitting the locality, advised me that he felt confident ...
>
> Among the difficulties and these not the least that had to be encountered, were the strenuous endeavors on the part of interested traders and others, who benefited by the presence of the Indians, to persuade them that the words of the Great Mother were not to their good, and even on the point of being prevailed upon to depart a [illegible] and successful attempt was made to retain them longer by advising them to await my arrival, as I was then about going through the country to visit the Blackfeet.
>
> My interview with them showed that I endorsed the course taken by my Assistant and after expressing my views in a most marked manner which appeared to dispel much of the hope they entertained of being able to have matters changed to meet their views, the greater portion under Big Bear, Lucky Man and Piapot left for the north and east, the Saskatchewan and Qu'Appelle Districts respectfully, the parts in which they were supposed to be treated with and claimed as their own.
>
> A hundred or more lodges of recalcitrants remained behind, but I felt assured that later on in the season these could be forced to act in accordance with my wishes and the Department make a large saving as regards transport supplies etc. which prediction has been fulfilled for on a return of Chief Lucky Man and some few lodges from the north I [illegible] ...[339]

From an official point of view at least, the situation had been resolved.

---

[339] Dewdney to Superintendent General of Indian Affairs, October 24, 1883, NA, RG 10, vol. 3744, file 29506-3 (ICC Documents, pp. 336-41).

FAMINE, INDIAN HEAD, SPRING 1884

Overall, the government may have been satisfied with the outcome, but neglect, illness, and starvation continued to be the lot of the Assiniboine on the Indian Head reserve. In May 1884, a physician who visited the encampments of Piapot, Long Lodge, and Man Who Took the Coat reported that the scurvy he observed there in February persisted owing to the absence of fresh food and vegetables from their diet. He felt it was useless simply to supply ammunition because ducks and chickens were very scarce.[340]

Hayter Reed forwarded the physician's report to Macdonald, but rather than admit any failing on the part of the department, Reed too blamed the Indians for their misfortune:

> [N]o doubt the death rate is large but it must be borne in mind that the first seeds of their complaints were sown during the sojourning of the Indians in the Fort Walsh District, owing to immoral habits, and were it not for this fact the use of [unreadable] would not have such a hurtful effect.
>
> When the doctor speaks of starvation the same does not mean that the quantities issued were not sufficient but that the Indians were unable to eat the bacon.[341]

Reed's use of the word "sojourning" implied that the Assiniboine were temporary residents of the Cypress Hills. Nevertheless, he did order a small quantity of meat and potatoes to be supplied.[342]

The department's year-end statistics indicate that the Assiniboine planted 55.5 acres of land with the following crops in 1884: wheat, 6.5 acres; barley, 2 acres; potatoes, 35 acres; turnips, 8 acres; carrots, 2 acres; and onions, 22 acres.[343]

BAND AMALGAMATION AND RESERVE SURVEY, 1885

Long Lodge died on Christmas Eve 1884, and Dewdney immediately proposed joining the two Assiniboine bands under Man Who Took the Coat.[344] In early March, McDonald convinced the followers of Long Lodge that this was a good idea,[345] and the amalgamation was formally approved by the department later that month.[346]

---

[340] D.C. Edwards to Agent McDonald, May 13, 1884, NA, RG 10, vol. 3745, file 29506-4 (ICC Documents, pp. 349-51).

[341] Hayter Reed, Indian Commissioner, to Superintendent General of Indian Affairs, May 20, 1884, NA, RG 10, vol. 3745, file 29506-4 (ICC Documents, pp. 352-53).

[342] Hayter Reed, Indian Commissioner, to Superintendent General of Indian Affairs, May 20, 1884, NA, RG 10, vol. 3745, file 29506-4 (ICC Documents, pp. 352-53).

[343] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 38).

[344] Dewdney to Superintendent General of Indian Affairs, January 10, 1885, NA, RG 10, vol. 3704, file 17825 (ICC Documents, p. 363).

At about the same time, Dewdney instructed Nelson to survey the Indian Head reserves, as Nelson's report to Dewdney shows:

> In the winter you informed me of your intention to have the reserves at Indian Head surveyed before undertaking the survey of the more extensive reserves at Bear Hill and Whitefish Lake.[347]

Accordingly, on June 5, 1885, John Nelson's survey party travelled about 10 miles southeast of Indian Head to survey the reserve for the band of Man Who Took the Coat and his new Long Lodge adherents.[348] By that time, Piapot was no longer at Indian Head, having returned to the Qu'Appelle Valley.

Nelson discussed the boundaries of the reserve with Man Who Took the Coat and the Indian agent:

> I left Indian Head, accompanied by Colonel McDonald, Indian Agent, to consult Chief Jack in regard to the boundaries of his reserve. He said since talking with Colonel McDonald in the spring, he had carefully examined the block of land set apart for the Assiniboine Indians, and would like to obtain that part of it which had been abandoned by Pie-pot, for he found both land and timber good, and preferred it to any farther west. Seeing no objection to this, it was decided between us that the tract which he desired should form part of the reserve for his band and that of the late Chief Long Lodge. The reserve was finally laid out nine miles from east to west by eight from north to south.[349]

The resulting 73.2 square mile (46,854 acre) area was confirmed as Assiniboine Indian Reserve (IR) 76 on May 17, 1889, by Order in Council 1151-1889.[350] Under the terms of Treaty 4, this tract represented land for

---

[345] Agent McDonald to Indian Commissioner, March 4, 1885, NA, RG 10, vol. 3704, file 17825 (ICC Documents, pp. 365-67).

[346] Dewdney to Superintendent General of Indian Affairs, March 9, 1885, NA, RG 10, vol. 3704, file 17825 (ICC Documents, p. 428), and author unknown to Dewdney, March 28, 1885, NA, RG 10, vol. 3704, file 17825 (ICC Documents, p. 429).

[347] Nelson Report, December 5, 1885, in Canada, Parliament, *Sessional Papers*, 1886, No. 4, "Annual Report of the Department of Indian Affairs for the year ended 31st December 1885," cited in Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, pt II, p. 28).

[348] Nelson to Dewdney, December 5, 1885, in Canada, Parliament, *Sessional Papers*, 1886, No. 4, "Annual Report of the Department of Indian Affairs for Year Ended 31st December 1885," 146-51 (ICC Documents, pp. 368-73); and federal Order in Council, May 17, 1889 (ICC Documents, pp. 374-75).

[349] Nelson to Dewdney, December 5, 1885, in Canada, Parliament, *Sessional Papers*, 1886, No. 4, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1885," 146, cited in Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 57).

[350] Federal Order in Council, May 17, 1889 (ICC Documents, pp. 374-75).

366 people; as at December 31, 1884, the department's Annual Report showed a total of 339 people, consisting of 251 in the band of Man Who Took the Coat and 88 with Long Lodge.[351] IR 76 was withdrawn from the operation of the *Dominion Lands Act* on June 12, 1893, by Order in Council 1694-1893.[352]

EXISTENCE OF CYPRESS HILLS RESERVE DENIED, 1909

About 20 years after the Assiniboine reserve near Indian Head was confirmed, the Deputy Minister of the Department of the Interior received an inquiry from A.J. Haig Russell[353] of Toronto, Ontario. He wanted "a map showing the Assiniboine Reserve in the Cypress Hills." He seemed somewhat familiar with the property: "A survey of it was made by Allan P. Patrick, D.L.S. If there is any map published by your Department showing it would you kindly send me a copy and oblige."[354]

Indian Affairs' response was to deny the existence of the former Assiniboine Reserve:

> With reference to your letter of the 10th instant, I have to state that this Department has no Indian Reserve in the Cypress Hills.
>
> What is now known as the Assiniboine Reserve is a few miles south west of the town of Wolseley, Sask. A plan of this reserve can be sent to you if it is the one desired.[355]

Russell pursued the matter further, asking again for a map of "the old Assiniboine Reserve":

> I am aware that there is now no Indian Reserve in the Cypress Hills and if you look at my letter of the 10th Inst. I think you will find I speak of the old reserve which I know from being on the ground at the time did exist and was surveyed, I think, by Allan Poyntz Patrick, DLS, some time in the early eightys. I am anxious for the purpose of identifying certain points on the ground to get the place of the southern and western boundarys [sic].[356]

---

[351] Jim Gallo, "Research Report on Carry the Kettle Claim to a Reserve in the Cypress Hills," revised November 1998 (ICC Exhibit 10B, p. 57).

[352] Order in Council PC 1694-1893, June 12, 1893, NA, RG 2, Series 1 (ICC Documents, pp. 376-78).

[353] No information was provided to the Commission regarding A.J. Haig Russell or what motivated his inquiry into a "reserve" in the Cypress Hills.

[354] A.J. Haig Russell to Deputy Minister of the Interior, October 10, 1909, NA, RG 10, vol. 4001, file 209590-1 (ICC Documents, p. 379).

[355] S. Stewart, Assistant Secretary, Indian Affairs, to A.J. Haig Russell, October 20, 1909, NA, RG 10, vol. 4001, file 209590-1 (ICC Documents, p. 380).

[356] A.J. Haig Russell to Secretary, Indian Affairs, October 23, 1909 (ICC Documents, p. 381).

J.D. McLean, Secretary, Department of Indian Affairs, would not admit to the existence of such a survey. He stated that the department did not have any such plans or field notes. Since there was no confirmation of the reserve, it was not under the jurisdiction of Indian Affairs. McLean wrote:

> With reference to your letter of the 23rd inst. I have to state that if Mr. A. Patrick, D.L.S. surveyed an Indian Reserve in the Cypress Hills in the early eighties it was not confirmed as such and therefore did not come under this Department, so that there are not now any plans or field notes of record here. It would become part of the Dominion Lands and the survey consequently would not be recognized by that Department.[357]

The question of whether a reserve was created for the Assiniboine in the Cypress Hills will be discussed in the next part of this report. What constitutes a "reserve" and, in particular, what circumstances necessitate a "surrender" of a reserve are essentially the questions before this Commission. Our analysis of these issues follows in the next sections of this report.

---

357 J.D. McLean, Secretary, Indian Affairs, to A.J. Haig Russell, October 28, 1909, NA, RG 10, vol. 4001, file 208590-1 (ICC Documents, p. 382).

PART III

ISSUES

Counsel for the First Nation and for Canada agreed that the Commission should address the following issues in this inquiry:

1. Was a reserve set apart at the Cypress Hills for the people of Chiefs Man Who Took the Coat and Long Lodge? More specifically,
    (a) was a reserve created pursuant to the terms of Treaty 4;
    (b) was a reserve created pursuant to the provisions of the *Indian Act*; or
    (c) was a *de facto* reserve created?

2. If a reserve was created, was there a valid surrender or extinguishment of the Band's interest in the reserve?

3. If there was a valid surrender, did the Crown breach any treaty, fiduciary, or other lawful obligation owed by Canada to the people of Chiefs Man Who Took the Coat and Long Lodge?

Part IV of this report sets out our analysis and findings on the issues before the Commission in this inquiry.

PART IV

ANALYSIS

ISSUE 1 CREATION OF CYPRESS HILLS RESERVE

Was a reserve set apart at the Cypress Hills for the people of Chiefs Man Who Took the Coat and Long Lodge? More specifically,

(a) was a reserve created pursuant to the terms of Treaty 4;
(b) was a reserve created pursuant to the provisions of the *Indian Act*; or
(c) was a *de facto* reserve created?

Issue 1(a): Was a Reserve Created Pursuant to the Terms of Treaty 4?

Treaty 4 was first executed at the Qu'Appelle Lakes on September 15, 1874, and its reserve clause describes the process for establishing Indian reserves and the nature of the Crown's obligation:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families.[358]

In 1877, the Assiniboine bands represented by Chiefs Man Who Took the Coat and Long Lodge adhered to Treaty 4, which incorporated, by reference, the provisions regarding the creation of reserves in the treaty by including, within the text of the adhesion, the following:

> We, members of the Assiniboine tribe of Indians, having had communication of the treaty hereto annexed, made on the 15th day of September, one thousand eight hun-

---

[358] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966) (ICC Documents, p. 29).

> dred and seventy four ... in consideration of the provisions of the treaty being extended to us ... And we hereby agree to accept the several provisions and the payment in the following manner, viz: That those who have not already received payment receive this year the sums of twelve dollars for the year 1876 ... and five dollars for the year 1877 ... and five dollars per annum for every subsequent year ...[359]

When they adhered to the treaty, the Assiniboine bands made it known that their territory included the Cypress Hills:

> The country claimed by the Assiniboine, admitted in treaty this year by me [Walsh] as the country of their forefathers, extends from the west end of Cypress Mountain to Wood Mountain on the east, north to the South Saskatchewan and south to Milk River.[360]

The terms of Treaty 4, then, required the Crown to set aside a reserve for the people of Chiefs Man Who Took the Coat and Long Lodge. Although Treaty 4 outlines a process for the establishment of Indian reserves, that process allows for considerable flexibility as to timing; the treaty is therefore not helpful in deciding the point in time when, in fact, a reserve has been created. In a number of other cases, the Commission has wrestled with the difficult factual question of whether a reserve has been created or not. As in those inquiries, we find it necessary to consider certain well-defined principles of law relating to treaty interpretation and to apply those fundamental principles to the reserve creation clause of Treaty 4 and to the circumstances of this case.

Principles of Treaty Interpretation

The Commission's deliberation in this and other inquiries has been informed most fundamentally by the hallmark principles of treaty interpretation recently summarized in *R. v. Badger*

> At the outset, it may be helpful to once again set out some of the applicable principles of treaty interpretation. First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. ... Second, the honour of the Crown is always at stake in its dealings with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or Aboriginal rights must be approached in a

---

[359] *Adhesion to Treaty No. 4 between the Assiniboine Band of Indians and Her Majesty the Queen at Fort Walsh* (Ottawa: Queen's Printer, 1966) (ICC Documents, pp. 27-28).

[360] Report, J.M. Walsh to Minister of the Interior, E.A. Meredith, October 28, 1877, Canada, Parliament, *Sessional Papers*, 1879, No. 10, xxxi-xxiv (ICC Documents pp. 39-42).

> manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. ... Third, any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed. ... Fourth, the onus of proving that a treaty or aboriginal right has been extinguished lies upon the Crown. There must be "strict proof of the fact of extinguishment" and evidence of a clear and plain intention on the part of the government to extinguish treaty rights.[361]

The Supreme Court of Canada most recently tested and affirmed the second principle stated in ***Badger***, "that the honour of the Crown is always at stake in its dealings with aboriginal people," in ***R. v. Marshall***.[362] This principle, the Court noted, dates back to its decision in ***Re Indian Claims***, where it stated

> that the terms and conditions expressed in those instruments [the treaties] as to be performed by or on behalf of the Crown, have always been regarded as involving a trust graciously assumed by the Crown to the fulfillment of which with the Indians the faith and honour of the Crown is pledged, and which trust has always been most faithfully fulfilled as a treaty obligation of the Crown.[363]

The Commission has previously relied upon these principles of interpretation in the context of three treaty land entitlement inquiries under Treaties 4 and 6.[364] Counsel to the First Nation and Canada have referred us to the Commission's findings in those three inquiries: Kahkewistahaw First Nation, Lucky Man Cree First Nation, and Gamblers First Nation. These cases provide a useful starting point for our analysis.

In the Commission's ***Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation***, the Commission stated:

> [A] band's ***entitlement*** to reserve land arises upon the band signing or adhering to treaty. However, the ***quantification*** and ***location*** of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under

---

[361] ***R. v. Badger***, [1996] 1 SCR 771 at 793-94.

[362] ***R. v. Marshall***, [1999] 3 SCR 456.

[363] ***R. v. Marshall***, [1999] 3 SCR 456 at 497, citing with approval ***Re Indian Claims*** (1895), 25 SCR 434 at 511-12.

[364] As we stated in our report of the Lucky Man Cree treaty land entitlement, "[i]t is just this sort of consensus or meeting of the minds that the Commission referred to in its report dealing with the Kahkewistahaw Band of Treaty 4, and we believe that this conclusion is equally applicable to bands under Treaty 6." ICC, ***Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation*** (Ottawa, March 1997), 73, reported (1998) 6 ICCP 109 at 162.

> Treaty 4, *"such reserves [are] to be selected by* officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians.*[365]

The Commission went on to describe the purpose of the "'conference" with the band:

> In our view, the purpose of the "conference" with the band was to ensure that the land to be set aside as reserve met with the approval of the chief and headman and that it was suitable for its intended purpose ...[366]

The Commission observed in that report that the process to create a reserve required a decision by *both* Canada and the First Nation:

> It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty.[367]"

In the Commission's report on the treaty land entitlement claim of the Lucky Man Cree Nation, the Commission stated that the act of consensus will *follow* the survey:

> It was only *following* the survey, when the band indicated its acceptance of the surveyed area as its reserve – either expressly (by saying so) or implicitly (by living on or using the reserve for its benefit) – that a true consensus could have been said to exist.[368]

The Commission went on to state:

> Arguably the logical extension of this requirement for consensus is that, just as it would have been open to a band to reject for its own reasons a reserve site selected by Canada, it would have been equally open to Canada to reject sites requested by the

---

[365] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), 67, reported (1998) 6 ICCP 21.

[366] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), 67-68, reported (1998) 6 ICCP 21.

[367] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), 69, reported (1998) 6 ICCP 21.

[368] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), 74, reported (1998) 6 ICCP 109.

> band if there were valid reasons for doing so. Canada's discretion in this regard would presumably have to be exercised reasonably, however.[369]

Finally, in the report on Gamblers First Nation TLE inquiry, the Commission addressed the requirement of the "conference" found in Treaty 4 and the need for consensus. The Commission said the following:

> To summarize, the Commission considers the "conference" requirement of Treaty 4 to be more than a formality. It is included to ensure that the land meets with the approval of band leaders and that it will be suitable for its intended purposes. Once Canada agrees to the band's selection and completes the survey, the band can expressly approve or disapprove of the land set apart; alternatively, it can signal its approval by continuing to reside on and use the reserve for the collective benefit of its members, or its disapproval by refusing to live on and use the reserve as surveyed.
>
> ...
>
> Neither party in this case has persuaded the Commission that it should take a different approach from the one it took in the Kahkewistahaw and Lucky Man inquiries. We still believe that the treaty makers intended the process of reserve selection to proceed by way of consensus and that, as a result, neither Canada nor the Band could unilaterally determine the location of the reserve.[370]

Therefore, as we have previously stated, in our view the Crown's obligation under Treaty 4 was to establish a reserve for the First Nation after appropriate consultation with the band to ensure that the reserved lands were suitable for their intended purpose. Following the process of consultation, the lands selected would generally be surveyed and Canada and the band would confirm their acceptance of that survey, either formally or by way of conduct. Thus, the requisite elements in the setting aside of a reserve include:

- consultation and selection;
- survey; and
- acceptance.

We will now consider each of these elements in the circumstances of this case.

---

[369] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Lucky Man Cree Nation* (Ottawa, March 1997), 76-77, reported (1998) 6 ICCP 109.

[370] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Gamblers First Nation* (Ottawa, October 1998), 65, 67, reported (1999) 11 ICCP 3.

Consultation and Selection

The evidence is uncontradicted that, within two years of adhering to Treaty 4, members of the Assiniboine Band of Man Who Took the Coat communicated their desire to settle down and select a reserve. Referring to a conference held at Fort Walsh on June 26, 1879, Commissioner Dewdney stated:

> I told them the Government would send them instructors who would show them how to cultivate the soil. I impressed upon them that the Government expected they should work the same as the white man did. I told them that I had brought two farmers with me who would at once commence to break up the soil and raise crops to furnish them with seed and food while at work on their own Reservations.
>
> I told them that if they would only make up their minds to settle down, I was sure that in two or three years they would be independent, and have plenty to live on, without begging from the Government ...
>
> All the Indians expressed great satisfaction at which I told them and two of the principal Chiefs, "The Man that stole the coat" an Assiniboine and "little Child" a Cree, *at once expressed a desire to select their land and settle down.*[371]

In a subsequent letter sent by Dewdney dated January 2, 1880, Man Who Took the Coat identified the lands he was selecting:

> The Assiniboine have not, as yet, settled on their reservations. One band whose Chief's name is "The Man-that-stole-the-coat", expressed a wish last spring to settle, and picked out land at the west of Cypress Mountain for his reservation.[372]

The evidence is also incontrovertible that the Assiniboine people were seeking a reserve in the Cypress Mountains. Dewdney reported that Man Who Took the Coat had identified the land he and his followers wanted as their reserve when he visited the site on October 26, 1879:

> On the 26th I left my party, and, in company with Lavallee visited the locality that the Assiniboine Chief had notified me in the spring that he would like for his reservations. It is situated on the north-west end of the Cypress Mountains, and is well located for farming, provided early summer frosts are not prevalent.[373]

---

[371] Edgar Dewdney, Commission er of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, in Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Annual Report of the Department of the Interior for the Year Ended 30th June 1879" (ICC Documents, pp. 64-69). Emphasis added.

[372] Edgar Dewdney, Commissioner of Indian Affairs, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Annual Report of the Department of the Interior for the Year Ended 30th June 1879" (ICC Documents, p. 56).

[373] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Annual Report of the Department of the Interior for the Year Ended 30th June 1879" (ICC Documents, p. 54).

The words of Chief Man Who Took the Coat were echoed by his descendants when the Commission twice visited the people of the Carry the Kettle First Nation and heard their oral history. The first of two visits took place in May 1997 and coincided with the First Nation's annual pilgrimage to the burial site of the Cypress Hills Massacre. Speaking through an interpreter, Elder Kaye Thompson spoke of her people's spiritual connection to the territory of the Cypress Hills:

> The reserve land chosen for our people through our Chief, The Man Who Took the Coat, was endowed with such significant qualities, echoing the sacred relationship pertinent to all of existence. To our people this area was their most sacred land. Our blessed homeland blossomed with sustenance, offering harmony, with such vitality, conceiving ceremonial grandeur, forever perpetuating life.[374]

It is not surprising that "the Assiniboine Chiefs *selected* the 'Head of the Mountain' in the western section of the Cypress Hills as the site of their reserve,"[375] given the history (both written and oral) that substantiates their occupation of the area. The Commission was struck by the extent to which the Assiniboine people had relied upon the Cypress Hills since time immemorial as a place of sanctuary during the winter months. Indeed, their economic, cultural, and spiritual connection to the Cypress Hills is not challenged by Canada.

The Survey

In the fall of 1879, Commissioner Dewdney instructed surveyor A.P. Patrick to survey a reserve for the Assiniboine in the Cypress Hills, but owing to inclement weather, Patrick was unable to complete his work until the following year. By January 29, 1880, Dewdney wrote to Surveyor General Lindsay Russell in Ottawa to report on Patrick's progress: "Mr. Patrick is now at Fort Walsh, and when able to work will complete a Reserve for the Assiniboine and one for the Cree ..."[376] It was not until June 1881 that Patrick forwarded his survey to Dewdney in Ottawa. In its submissions to the Commission, Canada took issue with A.P. Patrick's survey on two grounds. First, Canada argues that Commissioner Dewdney lacked the requisite authority to conduct and approve of a survey. Rather, the conduct and approval of the surveys were vested with the Surveyor General and the Dominion Lands Branch. Second, A.P. Patrick did not perform a "completed survey," as required by the procedure of the time. The Commission rejects both of Canada's arguments for the following reasons.

---

[374] ICC Transcript, May 30 1997, p. 21 (Kaye Thompson).

[375] Revised Submissions on Behalf of the Government of Canada, March 1, 1999, p. 4.

[376] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998, (ICC Exhibit 11, p. 26).

Dewdney's Authority

The Commission regards Canada's argument that Commissioner Dewdney lacked the authority to conduct and approve a survey as specious. Edgar Dewdney, as the Indian Commissioner for the North-West, was one of the senior representatives of the Government of Canada in the west at this time, charged with responsibility to carry out the requirements of the treaty covenants, and in this capacity subject only to the instructions of the Minister of the Interior. It is absurd to contend – some 120 years after the fact – that Indian Commissioner Dewdney lacked the authority to instruct and guide the very surveys that were then being undertaken across the prairies under his direction. It is acknowledged that the scope of Commissioner Dewdney's authority was subject to some discussion, but the Commission finds nothing in the subsequent actions of the Crown, in this case or elsewhere, to suggest that Dewdney's authority to instruct and approve surveys was repudiated at any time. In any event, the fundamental question, as we shall see, is whether the survey plans were accepted by Canada following their completion.

It is clear that the surveyor responsible for surveying the Assiniboine reserve, A.P. Patrick, received his instructions from Dewdney and proceeded on this basis. In his report of the survey of the Assiniboine reserve, A.P. Patrick stated:

> I had received your instructions on the 17th November, 1879, to define the limits of the Assiniboine ... Reserve, and had made several attempts to carry them into execution; but owing to the severity of the winter, I was able to make but very little progress ... I have to report that this Reservation comprises an area of about 340 square miles. It extends along the northern slope of the Cypress Hills. The direction of which is east and west, a distance of 11 miles having a depth of two miles on the summit platform and stretching away for 31 miles out on the prairie land ridge. The Indian farm is on the highest point of the range 4,000 feet above sea level and about two miles from the brow of the hills. On my arrival I met the Chiefs of the Band, who urged upon me their desire that the lines should be run so as to include the whole of the timbered land.
>
> After much persuasion, they consented that the course of the lines should be run as I provided north and south and east and west; my object in view being that the lines should in their direction accord with their general system adopted in govern-

> ment surveys; and further by this partition, a fair division of the timbered lands would be made.
>
> I carried out my survey accordingly and on my leaving them the Chiefs expressed themselves very well satisfied with the result ...[377]

Clearly, the oral evidence of the First Nation is that the Crown asked it to select a reserve and, once communicated, the Crown undertook a survey. In her oral testimony, Elder Kaye Thompson described the reserve in the following terms:

> The Man Who Took the Coat requested his reserve be surveyed at the head of the mountain, and he was given his reserve. The reserve was known as the "Assiniboine Reservation". We did not sell this land.[378]

Elder Andrew Rider offered this description:

> We are told by our forefathers that the Queen asked us to select a reserve in our traditional homeland, and the signing of the treaty this is what our leaders have done after consulting with our people our traditional way ... When we talk about Cypress Hills, we are talking about a reserve west of here, and the reserve that was chosen by the people ...[379]

Completed Survey

We now consider Canada's second challenge to Patrick's survey – namely, that it was not a "completed survey" by the standards of the day (as outlined in *Manual Shewing the System of Survey*).[380] Although the documentary record is admittedly lacking, the Commission believes that Patrick did complete a survey, which was submitted to Ottawa for review. We have no reason to believe that Patrick's survey was defective or wanting in specificity. We therefore reject Canada's argument.

Canada points out that a copy of survey has never actually been found. Counsel argues that the only document that has been found, Patrick's field book, does not contain the information necessary to plot a survey which conformed to the survey requirements of the day. It is Canada's submission that there is no greater evidence of this deficiency than the January 18, 1999, memorandum of Samuel Doyle of the Manitoba and Canada Land Surveyor's Commission to Mr Gallo, wherein Mr Doyle concludes that "the data necessary to plot the survey is not shown ... due to the deficiencies of the subject field notes ... I am unable to plot the surveyed boundaries with any degree of certainty."[381]

---

[377] [A.P. Patrick] to Edgar Dewdney, Indian Commissioner, North-West Territories, December 16, 1880, (ICC Documents, pp. 70-75).

[378] ICC Transcripts, May 30, 1997, p. 30 (Kaye Thompson).

[379] ICC Transcripts, May 30, 1997, p. 17 (Andrew Rider).

[380] *Manual Shewing the System of Survey Adopted for the Public Land of Canada in Manitoba and the North-West Territories, with Instructions to Surveyors, Illustrated by Diagrams* (1871) and the *General Instructions for the Survey of Indian Reserves, Department of Indian Affairs 1883 Circular*, Revised Submissions on Behalf of the Government of Canada, March 1, 1999, Appendix A.

The First Nation refutes Canada's submission as overly technical and submits that, if there is an issue as to the form of survey, the onus of proving that the survey was in some way deficient should be borne by Canada. Nonetheless, the First Nation points to the record of the day in which Patrick's survey was received in Ottawa in June 1881 and then forwarded by the Deputy Superintendent General of Indian Affairs, Vankoughnet, to Dewdney for approval. There is no suggestion on record that Vankoughnet found the materials in any way deficient.

In our view, the evidence before us demonstrates that Patrick did in fact survey a reserve for the Assiniboine in the Cypress Hills. The submission of Canada that this survey was technically deficient by the standard of the day is, however, not borne out by the facts. A review of the 1871 *Manual* reveals a system of survey adopted to set aside township blocks, and it has not been shown that this *Manual* was intended to define the specific requirements for the survey of Indian reserves. Daniel Babiuk, in his "Report Regarding the Claim of Carry the Kettle First Nation," explains the importance of specific mechanics to mark out Indian reserve boundaries:

> The manual deals with the surveying of base lines, meridians, township blocks and the subdivision of township blocks. There is absolutely no indication of how monuments on Indian Reserve boundaries should be marked. Traditionally they were marked I.R.; furthermore, not one of the diagrams indicated an Indian Reserve. The absence of any reference to an Indian Reserve ... is very conspicuous.[382]

We do not agree that the *Manual* established a standard procedure for the marking the boundaries of an Indian reserve and, in any event, it is ridiculous to attempt to measure a survey plan, which Canada itself cannot produce, against such a manual. We also reject the use of the "General Instructions (1883)" circular as a basis by which we should now compare Patrick's field book for the simple reason that this circular is not contemporaneous to

---

[381] Revised Submissions on Behalf of the Government of Canada, March 1, 1999, p. 9, and Appendix A.

[382] Daniel Babiuk, "A Report Regarding the Claim of Carry the Kettle First Nation," March 5, 1999 (ICC Exhibit 17, p. 3).

Patrick's work, and Canada has not drawn our attention to, or put into evidence, any guideline that may have been available to Patrick when he undertook his survey. The documentary record establishes that Patrick completed a survey of a reserve in the Cypress Hills in mid-summer 1880 and forwarded his plan to Ottawa for approval. Two other survey plans were forwarded at that same time, and it is informative that neither of those plans were rejected on the basis that they did not conform to the *Manual* or the "General Instructions (1883)," or indeed for any other reason. In short, we have no reason to believe that Patrick's survey was not proper by the standards of the day.

There is, however, the requirement that, *following* the act of selection and the act of survey, both the First Nation and Canada *accept* the survey of the land selected by the band.

Acceptance of the Survey

The key factual question before the Commission was whether Canada and the First Nation "accepted" the Patrick survey, either through a process of formal confirmation or by their conduct.

In the case of Carry the Kettle First Nation, the evidence is uncontradicted that the Band accepted the land surveyed by Patrick as its reserve. As evidence that the Assiniboine occupied and used the land surveyed by A.P. Patrick – thereby demonstrating their acceptance of this land as a reserve – the First Nation lists the following:

- Reports of the Assiniboine fishing on the "reserve";
- Report of surgeon, George Kennedy, after inquiring into sickness among the Assiniboine, in December 1880:

> ... October and November were marked by the prevalence of measles on the reserve on "the Head of the Mountain ..."[383]

- The Assiniboine were paid treaty at the "Assiniboine Reserve" in 1880;
- In Dewdney's 1880 report, he suggests that there were abandoned houses on the reserve "which will be made use of by the Indian Instructor sent there as well as by the Indians themselves";[384]

---

[383] Jayme Benson, "Report on the Assiniboine Claim to the Cypress Hills Reserve," November 27, 1998 (ICC Exhibit 11, Supporting Documents, tab 33).

[384] Edgar Dewdney, Indian Commissioner, North-West Territories, to Superintendent General of Indian Affairs, January 2, 1880, Canada, Parliament, *Sessional Papers*, 1880, No. 4, "Annual Report of the Department of the Interior for the Year Ended 30th June 1879" (ICC Documents, p. 54).

- From reports of farming operations, the Assiniboine were farming on the lands surveyed by Patrick in 1880;
- It was not until the spring of 1882 that the Assiniboine people left for Indian Head.[385]

It is the First Nations' submission that the above factors, along with the fact that reports do not clearly show the Assiniboine people to be anywhere *other than* the area surveyed by Patrick, should lead the Commission to conclude that the Band did in fact make use of and occupy the land surveyed for it as a reserve. Taken together, this evidence of use and occupation should lead the Commission to find that the Man Who Took the Coat and his followers *accepted* the surveyed land as their reserve.

Furthermore, the First Nation submits that Canada did administer the area as a reserve as evidenced by the following:

- Commissioner Dewdney reported to the Prime Minister and Parliament that the area was a reserve.
- A farm instructor was dispatched to the area by Commissioner Dewdney.
- An Indian agent was assigned to the area.
- Treaty payments were made at the "reserve."[386]

In our view, the evidence before us demonstrates that the First Nation accepted the land surveyed by Patrick for the Assiniboine as its reserve. More problematic, however, is the question whether Canada "accepted" the Patrick survey.

The key facts seem to us to be the following:

a Commissioner Dewdney instructed Patrick to survey an Assiniboine reserve in the Cypress Hills on November 17, 1879.

b Patrick began his survey in the winter of 1879, but did not complete it until the summer of 1880.

---

[385] Submissions on Behalf of Carry the Kettle First Nation, February 5, 1999, pp. 48-52.

[386] Submissions on Behalf of Carry the Kettle First Nation, February 5, 1999, pp. 48-52.

c Patrick submitted his survey (along with two others) to Ottawa in June 1881, where it was received by the Deputy Superintendent General of Indian Affairs, Vankoughnet.

d Vankoughnet then forwarded the plans on June 23, 1881, to Commissioner Dewdney, requesting approval or "certification."

e The plans were received by Dewdney's office on July 4, 1881.

f There appears to be no copy of Patrick's plan of survey in existence today.

g By November 1880, Commissioner Dewdney had recommended to Superintendent General of Indian Affairs Macdonald that the Assiniboine be relocated out of the Cypress Hills.

h The Carry the Kettle people had taken up occupation of the lands surveyed by Patrick at least since Patrick began preparations of the survey.

i Over the course of the summer and fall of 1881, the government advised the Assiniboine of its intention to close Fort Walsh and to relocate the Assiniboine from the Cypress Hills.

j In the spring of 1882, the government attempted physically to remove the Assiniboine from the Cypress Hills and settle them at Indian Head, Saskatchewan. Reluctant to stay, the Assiniboine returned to the Cypress Hills, where they remained until the spring of 1883. At that time the government eventually succeeded in relocating the community to proposed reserves at Indian Head.

k The situation at Fort Walsh and Cypress Hills during the winter of 1881–82 was as tragic as any in Canadian history. Approximately 2000 Indian people, including the Carry the Kettle band, were huddled at Fort Walsh facing starvation, deprivation, and uncertainty as to their future. The NWMP and the Department of Indian Affairs had been instructed to persuade, or, alternatively, coerce the various bands to disperse from Fort Walsh. In response to very specific instructions, the rations upon which the people had come to rely for survival were being meted out and in some cases withheld in an attempt to force people to leave.

The First Nation submits that the survey was accepted by the appropriate government authorities, as evidenced by the department's ***administration*** of the lands as an Indian reserve. The Commission has concluded, somewhat reluctantly, that the Government of Canada did not accept Patrick's survey and, therefore, that the lands set aside as a reserve in the plan were not accepted by Canada pursuant to the terms of Treaty 4. As we have noted previously, it is our view that the requisite elements to the setting aside of reserves under Treaty 4 included consultation and selection, followed by survey, followed by ultimate acceptance by both the First Nation and Canada. The acceptance of the survey could be effected in a formal manner or could be found in the conduct of either party. In this case, we have concluded that Canada did not accept Patrick's survey when it was submitted to Ottawa in June 1881. It is certainly clear that Dewdney dispatched Patrick to survey a reserve for the Assiniboine in the Cypress Hills. It is also incontrovertible that the Assiniboine did select land in the Cypress Hills and that Patrick did in fact survey the land selected. Nor is it possible to doubt that the land surveyed by Patrick was accepted by the Band. However, it is extremely unlikely that Dewdney would have accepted Patrick's survey when it reached his office in July 1881, since Canada, in consultation with Dewdney and others, had made a decision to relocate the Assiniboine from the Cypress Hills well before July 1881. In fact, that decision appears to have been made by November 1880 and communicated to the Assiniboine in the summer of 1881. Although there is no documentary record substantiating the rejection of Patrick's survey, all of Dewdney's actions and correspondence evidence a decision having been made to relocate the Assiniboine from the Cypress Hills. We therefore conclude that Canada did not accept Patrick's survey of the area selected by the Assiniboine in the Cypress Hills as a reserve pursuant to the requirements under Treaty 4. That being said, and as we will explain further in this report, whether Canada's decision to relocate the Assiniboine from the Cypress Hills was "fair" at the time and whether it is "fair" today is a matter we feel we must address within our "supplementary mandate" at the conclusion of this report.

Canada has, however, put forward several arguments that the Commission rejects and that we wish to briefly comment upon.

First, Canada asserts that the Assiniboine had "abandoned" the Cypress Hills before Patrick submitted his survey plan to the Government of Canada.[387] This is inaccurate. Patrick's survey plan was submitted to Ottawa in June 1881, and the Assiniboine were still living in the area when the government began its relocation efforts in the spring of 1882.

---

[387] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 11.

Second, Canada argues that the only appropriate evidence for "acceptance" of the Band's selection of land as reserve is the formal approval of the survey by the duly authorized officers of the Interior Department or the Department of Indian Affairs. No such approval of A.P. Patrick's survey of 1880 can be found on record, and therefore Canada argues that to state "a survey in and of itself gives full effect to the reserve clause of Treaty 4 is both erroneous and unsupported by the historical record."[388] We do not agree with Canada. In our view, the government could, by its conduct, be said to have "accepted" an allocation of reserve land, even though the survey was not formally approved. In the circumstances before the Commission, however, we conclude from all the evidence that the survey plan was rejected by Canada because it was quite inconsistent with the policy that had been adopted by the highest level of government of the day.

Finally, Canada submits that the absence of an order in council confirming the survey is further proof of Canada's lack of acceptance of the reserve. The exercise of the royal prerogative being an "outward public manifestation of the will of the Crown," Canada argues that reserves are "set apart" in law by the existence of the royal prerogative, which is evidenced by one of the following instruments:

- a proclamation, writ, letters patent, grant of other document under the Great Seal;
- an order in council; or
- a warrant, commission, order, or instruction under the Sign Manual.[389]

Canada refers to the Commission's finding in the Kahkewistahaw TLE report that an order in council can evidence the Crown's agreement of a reserve as surveyed. Although not disagreeing that an order in council can evidence the Crown's acceptance, the Commission did not find that a federal order in council is a necessary precondition to creating a reserve. At page 78 of the Kahkewistahaw TLE report the Commission stated:

> The subsequent conduct of the parties confirms that they agreed to treat the 1881 survey as the First Nation's reserve under Treaty 4. Although the Commission does not make any findings on whether a federal order in council is necessary before an Indian reserve can be created, the fact that the survey plan submitted by Nelson was

---

[388] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 16.
[389] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 18

> accepted by Canada by means of an order in council provides evidence that the Crown agreed to the reserve surveyed by Nelson in 1881 ...[390]

The parties agree that there is no evidence of an order in council confirming the setting aside of a reserve in Cypress Hills. In the Commission's view, an order in council is not a necessary prerequisite in any event.

In the final analysis, the Commission does agree that reserves were sometimes rejected, as unsuitable by Canada, *after* they had been surveyed but *before* they were formally "set apart" for a band.[391] Canada cites the following passage from the Commission's Lucky Man TLE report in support:

> Arguably, the logical extension of this requirement for consensus is that, just as it would have been open to the band to reject for its own reasons a reserve site selected by Canada, *it would have been equally open to Canada to reject sites requested by the band if there were valid reasons for doing so* ...[392]

Issue 1(b): Was a Reserve Created Pursuant to the *Indian Act*?

The issue to be determined here is whether a reserve has been set aside pursuant to the terms of the *Indian Act*. The Act at issue in these proceedings is the 1876 *Indian Act*.[393] By section 6 of the Act, a reserve is defined as follows:

> 6. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil, stone, minerals, metals or other valuables therein.[394]

Canada argues in its written submission that the definition of "reserve" as set out in the *Indian Act* establishes neither the authority nor the process for creating reserves.[395] Instead, Canada contends that the phrase "set apart by treaty or otherwise" directs us to the provisions of the treaty relative to reserve creation. Canada refers to the work of Professor Richard Bartlett in "The Establishment of Indian Reserves on the Prairies" and his analysis of the distinction between the Robinson treaties, which expressly defined the reserves set out thereunder, and the numbered treaties, in so far as Treaties 3, 4, 6, 8, and 10 do not provide for a "reservation" of any portion of land ceded under treaty.

---

[390] ICC, *Inquiry into the Treaty Land Entitlement Claim of the Kahkewistahaw First Nation* (Ottawa, November 1996), 78, reported (1998) 6 ICCP 21.

[391] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 16.

[392] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 14.

[393] *Indian Act*, SC 1876, c. 18.

[394] *Indian Act*, SC 1876, c. 18, s. 6, Canada's Book of Authorities, tab 8.

[395] Revised Submission on Behalf of the Government of Canada, March 1, 1999, p. 22.

> The "numbered" treaties upon such surrender provide for the establishment of reserves within the surrendered territory ... Treaties #3, 4, 6, 8 and 10 provided for the acreage of the reserves but declared that their location would be determined by subsequent selection.[396]

In effect, Canada then relies upon its previous submission to the effect that reserve lands were never "set apart" under the treaty itself. Canada also addresses the term "or otherwise" in section 6 of the Act and specifically considers whether the lands surveyed by Patrick within Treaty 4 territory in 1880 at "Head of the Mountain" were "otherwise" set apart. Canada appears to equate the phrase "or otherwise" to the exercise of (a) the royal prerogative for setting the lands apart as reserve, or (b) any "other authentic testimony" of the exercise of either the royal prerogative or a statutory authority for setting the lands apart as reserve.

As previously stated, there is neither an order in council nor any written instrument which provides evidence of the Crown agreeing to Patrick's survey. Further, there is no evidence of "other authentic testimony" – namely, the exercise of a statutory authority. Therefore, Canada takes the position that the lands surveyed by Patrick in 1880 were not "otherwise set apart" as a reserve within the meaning of section 6 of the *Indian Act*, SC 1876, c. 18.

In contrast, the First Nation submits that Canada's suggested reading of section 6 of the Act – to require that reserves be set out expressly in the treaties themselves – places too restrictive a meaning on "by treaty" as used in the definition of the term "reserve."

The use of the term "by" within the phrase "lands set apart *by* Treaty" has a broad meaning and should not be limited to the text of the treaty. Drawing from a range of common usages, the First Nation believes that the term "by Treaty" should be given the meaning of land set apart "through the Treaty," or "in consensus of the Treaty," or "in a manner consistent with the treaty."[397] Such an interpretation would be consistent, the Band argues, with the liberal construction rule of statutory interpretation. In the absence of specific provisions in the *Indian Act* in respect of the creation of reserves, or a process of setting lands apart, we are left with an examination, on the facts of this case, of the requirements under treaty to establish reserves.

---

[396] Richard Bartlett, "The Establishment of Indian Reserves on the Prairies," [1980] 3 CNLR 11-12.
[397] Submissions on Behalf of Carry the Kettle First Nation, February 5, 1999, p. 105.

In the case of *Ross River Dena Council Band v. Canada*, the Yukon Supreme Court was asked to determine if land which had been set aside as a band village site, but not designated as a reserve by order in council, should be considered a reserve for the purposes of the application of section 87 of the *Indian Act*.[398] In considering whether the land constituted a reserve, Justice Maddison stated:

> The *Indian Act* never has provided a method of creating a reserve. It follows that reserves have been "established in many different ways and several methods now appear to be recognized as having validly set apart land for the use and benefit of Indians.": Jack Woodward, *Native Law*,1996, p. 231. And as La Forest, G.V. said in *Natural Resources and Public Property under the Canadian Constitution*, University of Toronto Press, at p. 121:
>
>> In the areas not reserved by the proclamation [of 1763], reserves were established under many different types of authorities and instruments.[399]

In concluding that an absence of an order in council was not a bar to the creation of a reserve, Justice Maddison stated:

> The area reserved on January 26, 1965, was a tract of land that was (and is) vested in her Majesty. It has been applied for, for the use and benefit of a band: the Ross River Band. It was applied for, for a permanent use: a village site. That constitutes "use and benefit of a band" as in the *Indian Act* definition of "reserve."[400]

The federal Crown appealed the decision of the *Ross River Dena Council Band v. Canada* to the Yukon Court of Appeal, which rendered its decision on December 15, 1999, after the close of legal argument in this inquiry, although legal counsel to both the First Nation and Canada put the Commission on notice of the appeal decision.[401] The Yukon Court of Appeal, in a 2 to 1 decision, overturned the decision of Justice Maddison to find that the land "set aside" for the Ross River Dena is not a "reserve."[402] In its reasons, the court stated,

---

[398] Section 87 of the *Indian Act* deals with matters of taxation.

[399] *Ross River Dena Council Band v. Canada*, [1998] 3 CNLR 284 at 293 (YSC).

[400] *Ross River Dena Council Band v. Canada*, [1998] 3 CNLR 284 at 293-94 (YSC).

[401] Aly Alibhai, Counsel, Department of Justice, to David Osborn, Commission Counsel, Indian Claims Commission, December 18, 1999; Tom Waller, Counsel to Carry the Kettle First Nation, to Kathleen Lickers, Legal Counsel, Indian Claims Commission, January 24, 2000 (ICC file 2107-19-03).

[402] *Ross River Dena Council Band v. Canada* (December 15, 1999), (YCA) [unreported].

> Reserves were historically created by the federal Crown in fulfilment of its obligations under treaties with Indians, and of its fiduciary obligations generally with respect to Indians. As it is the prerogative of the federal Crown to establish a Reserve, evidence of the formal creation of a Reserve is usually in a federal Order-in-Council.
>
> ...
>
> To constitute a Reserve, the lands must be set apart *for the use and benefit of a band.* ...[403]

That there exists, and has existed in the Yukon, a statutory distinction between "lands set aside" and "reserves" was noted by the Court of Appeal to be beyond doubt. That this distinction is the result of a unique statutory regime required the Court of Appeal to give a meaningful interpretation to these two categories of land. The court inferred from its reading of an internal government document outlining the "procedure for setting aside or reserving lands in the territories" that "a more formal procedure, e.g. Order-in-Council, was contemplated for the creation of a reserve," thus allowing lands "set aside" to have a character quite distinct from "reserve land."[404]

In contrast, the Saskatchewan Queen's Bench decision of *Lac La Ronge Indian Band v. Canada* recently considered, among other issues, "what steps must be taken to create an Indian Reserve" in regards to land within Treaty 6. The judgment of the court was delivered by Gerein J, and in considering the procedure to create a reserve stated:

> There is no single method to create a Reserve. However, there are certain things which are essential. The Crown must make a deliberate decision to establish a Reserve; there must be consultation with the Indians; there must be a clear demarcation of the lands; and there must be some manifestation by the Crown that the lands will constitute an Indian Reserve.
>
> The position of the plaintiffs is that if there is consultation and demarcation, whether by survey or reference to the township plan, then a Reserve comes into existence. In my opinion, that approach is too broad and simplistic. There were times when this happened and a Reserve did result. There were instances when the surveyor was instructed to create the Reserve. No further approval was needed. There were other instances when the instructions were not all inclusive and the Crown did not expressly give its approval, but by its silence and subsequent attitude the Crown manifested its acquiescence in the land being constituted a Reserve. Then there were other instances when the instructions clearly limited the authority. In such a case a survey in itself was not sufficient.

---

[403] *Ross River Dena Council Band v. Canada* (December 15, 1999), (YCA) [unreported], ¶ 83. Emphasis added.

[404] *Ross River Dena Council Band v. Canada* (December 15, 1999), (YCA) [unreported], ¶ 108.

> It is my conclusion that the land was not "set apart" until the Crown treated it as such. That could happen in more than one way, including an absence of protest.
>
> As best I can make out, on the prairies all of the Reserves are the subject of an Order-in-Council. However, I do not consider such Orders to be an essential part of the process of establishing a Reserve ... The Orders-in-Council were no more than an administrative act which confirmed or clarified what already was a reality."[405]

In our view, Gerein J has correctly summarized the law as we understand it with respect to when a reserve is created. The reasoning of the court in that respect closely follows that of this Commission in its previous work, including the Lucky Man Cree Nation Report.

The Commission does not accept the contention that the setting aside of reserve land, in the context of the numbered prairie treaties, was simply a matter of royal prerogative. The treaties contemplated the involvement of both parties in the reserve creation process and, in our view, a true meeting of the minds was fundamental to the selection, surveying, and setting aside of reserves. In the result, there must exist some evidence of the intent of both Canada and the First Nation that the lands identified should be set aside as Indian reserves. In the circumstances of this case, we are unable to conclude that the Government of Canada was party to such a consensus.

Although it is clear that the First Nation's and the government's representatives in western Canada were working towards the setting aside of reserve lands at the Cypress Hills location in the summer of 1879 and 1880, it is equally clear that the Prime Minister of the day, Sir John A. Macdonald, who was also the Superintendent General of Indian Affairs at that time, and Edgar Dewdney, then the Indian Commissioner, had already decided by November 1880 that an Assiniboine reserve in the Cypress Hills would not be acceptable. It seems reasonably clear that this decision was made before the Patrick survey was received in Ottawa by Dewdney, on July 4, 1881. Although there is no documentary record to substantiate the rejection of Patrick's survey by Dewdney, all Dewdney's actions and correspondence speak to a decision having been made in late 1880 to relocate all the Indian people, including the Assiniboine, out of the Cypress Hills area. It is therefore not surprising that there is no record of the government's confirming Patrick's survey, as it did his Okanese and Starblanket surveys, which were also received by Dewdney in Ottawa in July 1881.

---

[405] *Lac La Ronge Indian Band v. Canada*, [2000] 1 CNLR 245 at 337-38.

We have therefore concluded that it cannot be said that Canada ever accepted the existence of a reserve for the Assiniboine in the Cypress Hills. This is our conclusion irrespective of whether the foundation for the existence of the reserve is said to be the treaty or the *Indian Act*. The factual question in issue remains the same in either case – namely, whether Canada set apart the Cypress Hills lands as a reserve and treated it as such. We have concluded that Canada did not.

A related question is, of course, whether the Assiniboine people can be said to have "accepted" the reserves proposed for them at Indian Head, Saskatchewan, in 1883. Those reserves were obviously not accepted without some real reservations on the part of many of the followers of Chiefs Long Lodge and Man Who Took the Coat. As noted previously in this report, a significant number of these people refused in the first instance to abandon their residency in the Cypress Hills, and continued to return to the Cypress Hills seeking refuge in the troubled years that followed. Ultimately, however, it seems as though the government achieved its enunciated policy by relocating the Assiniboine people to reserves outside the Cypress Hills, reserves which, in the fullness of time, it must be said they "accepted" as their own. Whether it was "fair" at the time and whether it is "fair" today, that the Assiniboine area does not reflect any historical or spiritual connection of the Assiniboine, is a separate matter, one we feel compelled to address at the conclusion of this report.

Issue 1(c): Was a *De Facto* Reserve Created?

The third issue for the Commission's consideration was whether a reserve was created in a *de facto* sense. We understand such a situation would exist where a reserve has, in fact, been created, even though the formal procedures, which would normally be ascribed to, have not been followed.

"De facto" is defined in ***Black's Law Dictionary*** as follows:

> de facto /. In fact, indeed, actually. This phrase is used to characterize an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes, but is illegal or illegitimate.[406]

Both the First Nation and Canada submit that a reserve may be created on a *de facto* basis. In Canada's view, the concept of *de facto* reserve creation arises from the decision of the Supreme Court of Canada in *Canadian Pacific Ltd. v. Paul et al.*, [1988] 2 SCR 456, where the Court stated:

---

[406] *Black's Law Dictionary*, 6th ed., 417.

> It is clear that by virtue of the 1851 deed the land in question was vested in the Crown. Shortly thereafter it became an Indian reserve. The trial judge placed some importance on the fact that there was no formal allocation of the land as a reserve prior to Confederation. It seems to us, however, to be somewhat inconsistent to demand such formality for allocation as a reserve while at the same time accepting the lack of a "formal grant" of land to the Woodstock Railway Company. We are of the view that it can be accepted that the land in question was part of the Woodstock Reserve before Confederation.[407]

Similarly the decision in *Lac La Ronge Band v. Beckman*[408] is cited by Canada in support of the *de facto* creation of reserves. But, as Canada submits, the court in that case did not make a final determination as to precisely what was required to create a reserve *de facto*. Matheson J did, however, suggest that evidence of the use or occupation of the land in question by the band, as well as consideration by Canada of the land as a reserve, would be necessary to establish the existence of a reserve:

> If this dispute over the Candle Lake lands was between the province and Canada, an argument by Canada that an Indian reserve existed, in fact, might receive serious consideration if the evidence justified a conclusion of a de facto reservation. But Canada does not take that position, quite properly, because there is no evidence to support it. The Candle Lake lands were never occupied, nor used, by any members of the Lac La Ronge Band as a reserve, and the lands were never considered by Canada, whose responsibility it was to establish Indian reserves, as a reservation.[409]

In effect, the question before the Commission is the very question that we have already addressed – namely, whether Canada by its conduct set aside a reserve. The First Nation argues that a *de facto* reserve can be said to be created in circumstances where Canada and the band treat an allocation of land as reserve, even though the land is not set aside in any formal manner. We agree that the law of Canada allows for such a *de facto* reserve creation, and in that respect the case authorities seem entirely consistent: *Canadian Pacific Ltd. v. Paul*,[410] *Lac La Ronge Band v. Beckman*,[411] *Ross River Dena*

---

[407] *Canadian Pacific Ltd. v. Paul et al.*, [1988] 2 SCR 654 at 675.

[408] *Lac La Ronge Band v. Beckman*, [1990] 3 CNLR 10 (Sask. QB).

[409] *Lac La Ronge Band v. Beckman*, [1990] 3 CNLR 10 at 36 (Sask. QB).

[410] *Canadian Pacific Ltd. v. Paul et al.*, [1988] 2 SCR 654.

[411] *Lac La Ronge Band v. Beckman*, [1990] 3 CNLR 10 (Sask. QB).

Council Band v. Canada.[412] However, fundamental to the creation of a reserve is a determination, as a question of fact, that both the First Nation and Canada accepted the allocated land as the First Nation's reserve. The totality of evidence does not demonstrate that the land set aside in the Cypress Hills was a reserve for the Assiniboine people. The Commission feels that recasting the issue as "*de facto*" does not change the essential factual question that we have previously answered.

Unlike *Paul,* we do not believe that the Crown, by its conduct in this case, can be found to have accepted the creation of a reserve for the Assiniboine. In fact, Canada started proceedings to move the Assiniboine out of the Cypress Hills even before they were presented with Patrick's survey. If we are to accept the First Nation's argument of a *de facto* reserve in this case, then we must be prepared to find that a surveyor hired by the government has the ability unilaterally to create a reserve, which the government must then accept – *de facto*. Surely this cannot be the case. For the reasons already stated, we do not believe Canada accepted a reserve for the Assiniboine in the Cypress Hills.

Having found that the totality of the evidence does not support a finding that a reserve was created for the Assiniboine in the Cypress Hills pursuant to the terms of Treaty 4, the provisions of the *Indian Act*, or on a *de facto* basis, we are forced, somewhat reluctantly, to conclude that Canada does not owe an outstanding lawful obligation to the First Nation.

ISSUES 2 AND 3

2 If a reserve was created, was there a valid surrender or extinguishment of the Band's interest in the reserve?

3 If there was a valid surrender, did the Crown breach any treaty, fiduciary, or other lawful obligation owed by Canada to the people of Chiefs Man Who Took the Coat and Long Lodge?

Based upon our findings in Issue 1(a), (b), and (c), it is not necessary for us to consider Issues 2 and 3.

---

[412] *Ross River Dena Council Band v. Canada* (December 15, 1999), (YCA) [unreported].

FAIRNESS IN THE RESULT: OUR SUPPLEMENTARY MANDATE

The Commission has since its inception understood that it has a responsibility to the Governor General in Council, described as a "supplementary mandate," to draw to government's attention circumstances where we consider the outcome to be unfair, even though those circumstances do not, strictly speaking, give rise to an outstanding lawful obligation. This is such a case.

The supplementary mandate of the Commission was first described in 1991 by the then Minister of Indian Affairs, Tom Siddon, in the following terms:

> If, in carrying out its review, the Commission concludes that the policy was implemented correctly but the outcome is nonetheless unfair, I would again welcome its recommendations on how to proceed.[413]

Moreover, in a 1993 letter to the Commission, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the Commission's jurisdiction:

> (1) I expect to accept the Commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair ...[414]

The Commission has exercised this authority sparingly and only in unique circumstances which give rise to a demonstrable inequity or unfairness that we feel should be drawn to the attention of the Government of Canada.

The Commission relies upon its supplementary mandate in this case because the "outstanding lawful obligation" test, which is defined in the Specific Claims Policy, will not bring this historical grievance to a close. Moreover, the historical circumstances of the Cypress Hills Massacre and the relocation of the Assiniboine people out of the Cypress Hills require a just solution, which cannot be achieved within the framework of the Specific Claims Policy. Indeed, it seems to us that the claim put forward by the Carry the Kettle Band has less to do with monetary compensation than it does with some form of recognition of the connection between these Assiniboine people and the Cypress Hills, one that would recognize, rather than deny, their historical occupation and spiritual and cultural connections to these lands.

---

[413] Tom Siddon, Minister of Indian Affairs and Northern Development, to Ovide Mercredi, National Chief, Assembly of First Nations, November 22, 1991.

[414] Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993.

It is clear to us that, when reserves were selected and apportioned under Treaty 4, the Assiniboine people sought to preserve their connection to the Cypress Hills. Although many other First Nations had sought sanctuary in the Cypress Hills, the Carry the Kettle Band repeatedly fought the government's attempts to relocate it to other reserve lands. Eventually, the Carry the Kettle Band succumbed to this pressure, but it did so reluctantly and only when faced with the spectre of starvation as an alternative. Only the Nekaneet Band, which refused to accept any reserve as a substitute until 1913, could be said to have been more steadfast in its commitment to the Cypress Hills. We have found the ancestral claim of the Carry the Kettle Band to the Cypress Hills to be historically accurate and morally compelling.

We would also point out to the Government of Canada that it was this very band which was victimized by American traders and wolfers in the event known as the Cypress Hills Massacre. Indeed, the Carry the Kettle community continues to journey annually to the Cypress Hills, and the site of the massacre is a place of significant emotional and spiritual importance to it. Remarkably, the location of the Cypress Hills Massacre is not set aside or demarcated in any way. At least part of this site remains in private hands. Given that the Cypress Hills Massacre was one of the instrumental historical events in the settlement of the Canadian West, this situation strikes us as surprising. It is clear, in the final analysis, that the Carry the Kettle First Nation received treaty land elsewhere in Saskatchewan and, indeed, we are aware that in recent years a treaty land entitlement was advanced by that First Nation to secure its proper quantum of land under Treaty 4. It is difficult to suggest, at this juncture, that those other reserve lands were not "accepted" by these Assiniboine people in substitution for the Cypress Hills lands. However, none of these facts addresses the historical grievance. They do not recognize the connection that has existed between the Carry the Kettle people and the Cypress Hills since time immemorial, nor do they recognize the historical importance and trauma associated with the Cypress Hills Massacre.

We believe that circumstances often arise in the context of aboriginal land claims where it is possible to resolve a historical grievance and simultaneously create a great deal of good will with the investment of a relatively small amount of money. Indeed, in some respects, many claims would be more usefully resolved if they were addressed on the basis of the pursuit of a just solution, one that recognized important historical connections to the land, rather than through the payment of vast sums of compensation. This case seems to us to be exactly such a circumstance. It is not really a claim about money, and a fair result would be for the Government of Canada to work together with the Assiniboine people to achieve two objectives. First, the site of the Cypress Hills Massacre should be acquired, and appropriately designated and recognized, as the important historical location it is. Secondly, the government should work together with the Assiniboine people to secure an appropriate site in the Cypress Hills for the cultural and spiritual purposes of this First Nation. In our view, this can be done economically and in a manner that is respectful of the other legitimate stakeholders who occupy, use, and enjoy the Cypress Hills. In our opinion, it is only fair, however, that those others recognize that it is these very Assiniboine people who have sought sanctuary in the Cypress Hills since before recorded history. The Government of Canada does not have a legal obligation to do either of these things, but in our view it would be the right, just, and moral thing to do.

PART V

CONCLUSIONS AND RECOMMENDATIONS

We have concluded that a reserve in the Cypress Hills was not created for the people of Chiefs Man Who Took the Coat and Long Lodge by the terms of Treaty 4, the provisions of the *Indian Act*, or on a *de facto* basis. We nevertheless recommend, pursuant to our supplementary mandate, that the Government of Canada recognize the Carry the Kettle First Nation's historical connection to the Cypress Hills and restore to the Assiniboine people their connection to this territory.

RECOMMENDATION 1

That the site of the Cypress Hills Massacre be acquired by the Government of Canada and appropriately designated and recognized as the important historical location it is.

RECOMMENDATION 2

That the Government of Canada work together with the Assiniboine people to secure an appropriate site in the Cypress Hills for the cultural and spiritual purposes of this First Nation.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC Co-Chair	Roger J. Augustine Commissioner	Carole T. Corcoran Commissioner

Dated this 28th day of July, 2000.

APPENDIX A

CARRY THE KETTLE FIRST NATION CYPRESS HILLS INQUIRY

1	**Request to conduct an inquiry**	August 30, 1996
2	**Planning conferences**	November 26, 1996 March 11, 1997
3	**Community sessions**	May 30, 1997 October 20, 1997

The Commission heard from the following witnesses:
Chief James O'Watch, Elsie Koochicum, Kaye Thompson, Dr Kenneth Ryan, Melda Netmaker, Andrew Rider, Delmer Runs, Wilma Kennedy, Bertha O'Watch, Cora Grey

4	**Legal argument**	May 5, 1999

5 **Content of formal record**

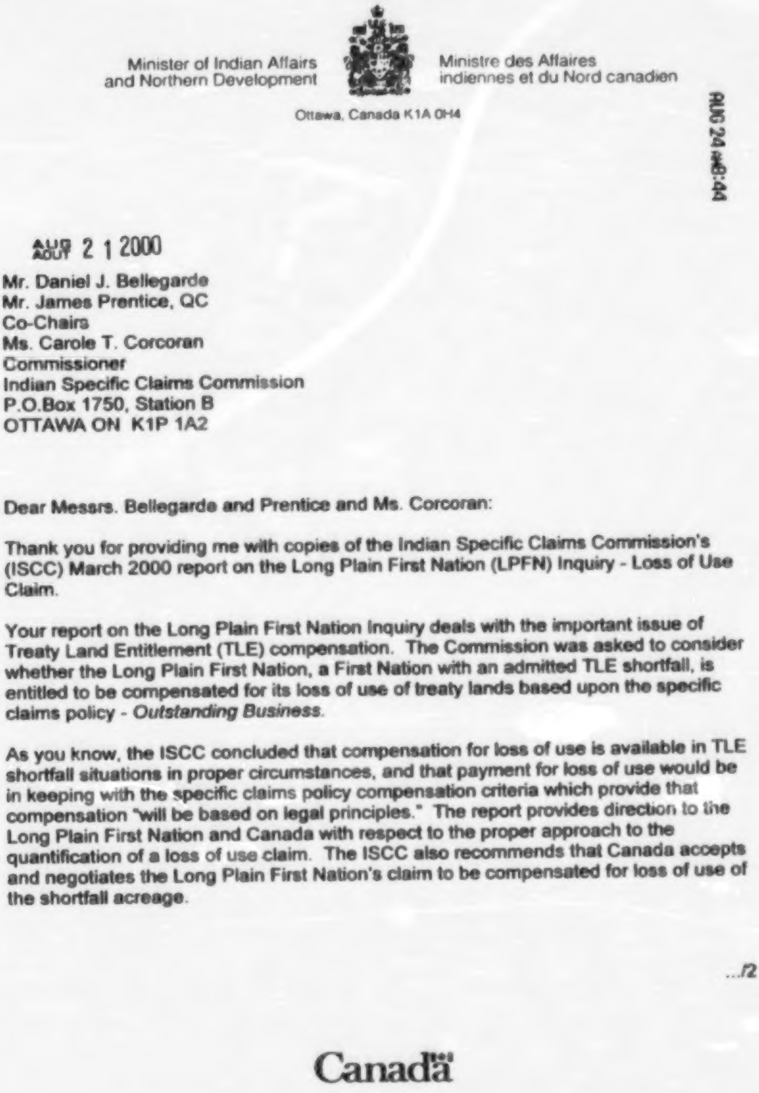
The formal record for the Carry the Kettle First Nation Inquiry consists of the following:

- 19 exhibits tendered during the inquiry, including the documentary record (3 volumes of documents with annotated index)
- written submissions from counsel for Carry the Kettle First Nation and counsel for Canada
- transcripts from community sessions (two volumes)

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.

RESPONSES

Re: Long Plain First Nation Loss of Use Inquiry
Robert D. Nault, Minister of Indian Affairs and Northern Development, to
Daniel J. Bellegarde, James Prentice,
and Carole T. Corcoran, Indian Claims Commission,
August 21, 2000
329



Minister of Indian Affairs
and Northern Development

Ministre des Affaires
indiennes et du Nord canadien

Ottawa, Canada K1A 0H4

AUG 24 8:44

AUG
AOÛT 2 1 2000

Mr. Daniel J. Bellegarde
Mr. James Prentice, QC
Co-Chairs
Ms. Carole T. Corcoran
Commissioner
Indian Specific Claims Commission
P.O.Box 1750, Station B
OTTAWA ON K1P 1A2

Dear Messrs. Bellegarde and Prentice and Ms. Corcoran:

Thank you for providing me with copies of the Indian Specific Claims Commission's (ISCC) March 2000 report on the Long Plain First Nation (LPFN) Inquiry - Loss of Use Claim.

Your report on the Long Plain First Nation Inquiry deals with the important issue of Treaty Land Entitlement (TLE) compensation. The Commission was asked to consider whether the Long Plain First Nation, a First Nation with an admitted TLE shortfall, is entitled to be compensated for its loss of use of treaty lands based upon the specific claims policy - *Outstanding Business*.

As you know, the ISCC concluded that compensation for loss of use is available in TLE shortfall situations in proper circumstances, and that payment for loss of use would be in keeping with the specific claims policy compensation criteria which provide that compensation "will be based on legal principles." The report provides direction to the Long Plain First Nation and Canada with respect to the proper approach to the quantification of a loss of use claim. The ISCC also recommends that Canada accepts and negotiates the Long Plain First Nation's claim to be compensated for loss of use of the shortfall acreage.

.../2

Canadä

- 2 -

The release of this report is timely, following only a few months after the Saskatchewan Queen's Bench (SQB) ruling in *Venne v. The Queen*, which also deals with TLE compensation for shortfall claims. In *Venne*, the Court held that Canada could fulfill its outstanding TLE obligations by providing a quantum of land based on a First Nation's current population, calculated at the time sufficient treaty land was actually provided. Canada has filed an appeal from the SQB's ruling with the Saskatchewan Court of Appeal, to seek additional clarification of its obligations in the area of TLE compensation.

As the *Venne* litigation deals with the same subject matter as the Long Plain First Nation report, and as the Commission did not address the implications of *Venne* - for the Long Plain First Nation claim, and/or for the area of TLE compensation more generally - in its report on this claim, Canada is not in a position to accept or reject the ISCC's recommendations at this time.

I would, nonetheless, like to thank the Commission for its thorough, helpful analysis of this complex issue, and I regret that at this juncture I am not able to give yourselves and the First Nation a more definitive response.

Yours sincerely,

Robert D Nault

Robert D. Nault, P.C., M.P.

c.c.: Chief Dennis Meeches and Council
Mr. Jeffrey F. Harris

THE COMMISSIONERS

Co-Chair Daniel J. Bellegarde is an Assiniboine/Cree from the Little Black Bear First Nation in southern Saskatchewan. From 1981 to 1984, Mr Bellegarde worked with the Meadow Lake District Chiefs Joint Venture as a socio-economic planner. He was president of the Saskatchewan Indian Institute of Technologies from 1984 to 1987. In 1988, he was elected first vice-chief of the Federation of Saskatchewan Indian Nations, a position he held until 1997. He is currently president of Dan Bellegarde & Associates, a consulting firm specializing in strategic planning, management and leadership development, self-governance, and human resource development in general. Mr Bellegarde was appointed Commissioner and then Co-Chair of the Indian Claims Commission in July 1992 and April 1994, respectively.

Co-Chair P.E. James Prentice, QC, is a lawyer with the Calgary law firm of Rooney Prentice. He has an extensive background in native land claims, commencing with his work as legal counsel and negotiator for the Province of Alberta in the tripartite negotiations that brought about the Sturgeon Lake Indian Claims Settlement of 1989. Since that time, Mr Prentice has participated in the inquiry or mediation of some 70 treaty land entitlement and surrender claims across Canada. Mr Prentice was appointed Queen's Counsel in 1992. He has also been the facility leader at the Banff Centre for Management's annual program on Specific Claims since 1994. He was appointed Commissioner and then Co-Chair of the Indian Claims Commission in July 1992 and April 1994, respectively.

Roger J. Augustine is a Mi'kmaq born at Eel Ground, New Brunswick, where he served as Chief from 1980 to 1996. He was elected president of the Union of NB-PEI First Nations in 1988, and completed his term in January 1994. He has received the prestigious Medal of Distinction from the Canadian Centre on Substance Abuse for 1993 and 1994 in recognition of his efforts in founding and fostering both the Eel Ground Drug and Alcohol Education Centre and the Native Alcohol and Drug Abuse Rehabilitation Association. In June 1996, he was named Miramichi Achiever of the Year by the Miramichi Regional Development Corporation. He was appointed Commissioner in July 1992.

Carole T. Corcoran is a lawyer with the Vancouver law firm of Fast & Corcoran. She is a Dene from Fort Nelson, British Columbia, and has extensive experience in aboriginal government and politics at the local, regional, and provincial levels. She has served on several boards and commissions, including the Royal Commission on Canada's Future (1990–91), the British Columbia Treaty Commission (1993–95), the Board of Governors, University of Northern British Columbia (1993–95), the Conflict Management Board, Royal Rhodes University (1997–2000), the Insurance Corporation of British Columbia (1998–2000), and as Co-Chair, First Nations Summit, BC (1998–2000). She was appointed to the Indian Claims Commission in July 1992.

Sheila G. Purdy has been an advisor to the Government of the Northwest Territories on justice and other matters relating to the territorial division and the creation of Nunavut. From 1993 to 1996, she was senior policy advisor to the Minister of Justice and the Attorney General of Canada on a number of justice issues, including aboriginal justice, the Canadian Human Rights Act, and violence against women. From 1991 to 1993, she was policy analyst to the National Liberal Caucus Research Bureau for the constitution, justice, aboriginal affairs, women, human rights, and the Solicitor General. In 1992 and 1993, she was special advisor on aboriginal affairs to the Office of the Leader of the Opposition, and from 1989 to 1991 a legal consultant on environmental issues. A strong advocate against abuse of the elderly, she is co-author of ***Elder Abuse: The Hidden Crime***. In 1988, she received the Award of Merit from Concerned Friends for her efforts in this area. She worked as a lawyer in private practice from 1982 to 1985, after graduating with a law degree from the University of Ottawa in 1980. She was appointed Commissioner in May 1999.